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IN THE

Supreme Court of the United States

JACK YETIV AND ASPENWOOD APT. CORP.,

Petitioners,

v.

CITY OF HOUSTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE: Is it correct—as Justices Stevens, Breyer, Souter, and Ginsburg have suggested in their *Bryan County* dissents—that 42 U.S.C. § 1983 is consistent with *respondeat superior* liability against cities?

QUESTION TWO: Should a city be held liable under 42 U.S.C. § 1983 where:

1. Petitioners complained about City agents' unconstitutional conduct directly to City Council, and the unconstitutional conduct continued thereafter?

And where

2. A City policymaker—who actually made policy, had 200 employees under her command, and was responsible for an $11 million annual budget—was the individual that personally took and also directed unconstitutional actions against Petitioners?

And where

3. The City illegally implemented policies it had to search, to withhold repair permits from, and to demolish low-income property?

CERTIFICATE OF PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE

The parties to the proceedings in the First Court of Appeals, Houston, Texas, and subsequently in the Texas Supreme Court, include:

1. Petitioners and Appellees, Jack Yetiv and Aspenwood Apt. Corp.

2. Respondent and Appellant, City of Houston.

   Councilmember Helen Huey and Beatrice Link (a city official) were individual defendants in the trial court, but were granted summary judgment. Petitioners appealed the grant of summary judgment to these individual defendants, and the appeals court reversed summary judgment and remanded that part of the case for re-trial, a decision that neither Link nor Huey challenged. Therefore, neither of these individual defendants are parties to this appeal.

   Aspenwood Apt. Corp. has no parent company and no subsidiaries.

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The unpublished clerk's letter from the Texas Supreme Court denying review is reproduced in the separately bound Appendix ("App.") included with this petition at 1a. The unpublished opinion of Texas' First Court of Appeals can be found at 1999 WL 681939 (Aug. 27, 1999), and is reproduced at App. 2a. A subsequent unpublished opinion of the same court can be found at 2002 WL 89650 (January 24, 2002) and can be found at App. 66a. The trial court's unreported Modified Final Judgment dated Oct. 20, 1997 is reproduced at App. 79a.

STATEMENT OF JURISDICTION

The Texas Supreme Court denied, on June 27, 2002, Petitioners' request to review the appeals court's opinion. This appeal concerns the interpretation of a federal statute, 42 U.S.C. § 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Questions Presented

In April, 1994, Aspenwood Apt. Corp. ("Aspenwood") purchased a half-vacant apartment complex called Aspenwood Apartments, intending to renovate and lease the vacant units. Despite more than a dozen written and verbal attempts by Aspenwood's representative, Jack Yetiv ("Yetiv"), to get repair permits for the property, the City refused to issue the permits. In September, 1994, Yetiv learned that the City of Houston had recently revoked the permits of another apartment complex in the neighborhood (owned by the Leaths), and then demolished that complex. Yetiv also learned that the City had attempted to settle, in secret, the Leaths' resulting lawsuit for $210,000.

Seeing a pattern, Yetiv hand-delivered a complaint letter to all City of Houston councilmembers on October 5, and appeared on the local evening news a few days later. On the *Evening News* show, Yetiv alleged that Beatrice Link (a high-level City official), and Councilmember Helen Huey (the councilmember responsible for the district where both the Aspenwood and Leath properties were located), were violating his property rights by refusing to issue him building repair permits because Councilmember Huey, for her own political purposes, had promised the homeowners in the area that the Aspenwood Apartments would be demolished. The day after making his comments on the *Evening News*, Yetiv appeared before Houston's City Council (following his written complaint to the councilmembers the week before), and advised council (in a videotaped appearance later seen by the jury) that city employees had illegally searched Aspenwood and withheld its building permits.

Council took no action in response to Yetiv's complaints.

After Yetiv's October 10-11 TV and Council appearances, the City escalated its unconstitutional conduct.

In addition to refusing to issue building permits, the City violated Petitioners' Fourth Amendment rights on several occasions. For example, on October 27, 1994, approximately 30 City inspectors and demolition contractors, accompanied by several armed police officers, conducted an illegal "raid" of the Aspenwood apartment complex. The raid was made pursuant to a defective search warrant—defective for multiple reasons, including the fact that it was based on a false sworn affidavit. City inspectors had testified in the affidavit that they saw, from the street, repairs being made to buildings that cannot be seen from the street. During the raid, City inspectors issued Yetiv 23 criminal citations, all of which were later dismissed when *none* of the four inspectors who had written the citations appeared in court.

Several weeks after Yetiv complained to Houston's City Council, that Council—instead of investigating Yetiv's complaints of illegal permit-withholding and Fourth Amendment violations—voted to *sue* Yetiv and Aspenwood. The City never pursued its frivolous lawsuit, but Petitioners counterclaimed under 42 U.S.C. § 1983 against the City, and against Councilmember Huey and Beatrice Link in their individual capacities. On January 24, 1995, pursuant to Petitioners' counterclaim, the court ordered the City to issue the building permits. In November, 1995, the City *again* withheld Aspenwood's repair permits—in *direct violation* of the January 24, 1995 court order. After further court action by Yetiv, the City resumed issuing permits to Aspenwood. After receiving the permits, Yetiv moved to Aspenwood to supervise the repairs. Aspenwood diligently renovated all 14 apartment buildings on the property, and the work was completed in 1999. A videotape showing the progress of the renovation was played to the jury near the end of the trial.

Following a jury trial, judgment was entered in favor of Petitioners in the amount of $337,500, to compensate Aspenwood for lost income resulting from the permit-withholding, plus $3,000 for violating Aspenwood's Fourth

Amendment rights, plus attorneys' fees, interest and costs.

Prior to trial, the judge had entered three progressively more stringent injunctions against the City to prevent repeated Fourth Amendment violations. When the City violated the first injunction, the trial judge expanded it, and when the City violated the second injunction, the trial judge held the City in contempt, levied monetary sanctions against the City—and entered a third, even broader injunction. That injunction was made permanent in the final judgment, as were the sanctions levied by the trial judge for the City's violation of his injunctions.

B. Federal Question Sought to Be Reviewed Was First Raised in the Trial Court

The federal question was first raised in the trial court, where Plaintiffs filed this 42 U.S.C. § 1983 counterclaim. Section 1983 was, in large part, the basis for the City's appeal to the Texas First Court of Appeals, and subsequently, Petitioners' Petition for Review to the Texas Supreme Court. Section 1983 is extensively dealt with in the two appeals court opinions (App. 2a and 66a).

C. Procedural History

At the conclusion of the trial, the judge entered a final judgment which: (1) granted Petitioners substantial monetary damages for the City's violation of Petitioners' Fourth, Fifth and Fourteenth Amendment rights, (2) declared unconstitutional certain portions of a City of Houston ordinance, and (3) entered a permanent injunction forbidding the City from conducting inspections of Yetiv's three apartment complexes, based on a finding by the trial judge (as well as the jury) that the City had repeatedly conducted such inspections in violation of Petitioners' Fourth Amendment rights. The trial judge also granted summary judgment to the individual defendants.

The City appealed the above judgment, while Yetiv and Aspenwood appealed the grant of summary judgment to Link and Huey. On August 27, 1999, the Texas First Court of Appeals issued an unpublished opinion which reversed the judgment and rendered in favor of the City . The panel also reversed Link and Huey's summary judgment, remanding that portion of the case to the trial court. Huey and Link did not challenge the appeal court's reversal of their summary judgment, rendering that part of the appeal final. Petitioners requested *en banc* consideration, which was denied, but a Supplemental Opinion was issued on January 24, 2002. Petitioners petitioned for review by the Texas Supreme Court, which petition was denied on June 27, 2002.

REASONS FOR GRANTING THE PETITION

QUESTION ONE

Is it correct—as Justices Stevens, Breyer, Souter, and Ginsburg have suggested in their *Bryan County* dissents—that 42 U.S.C. § 1983 is consistent with *respondeat superior* liability against cities?

In 1978, this Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), and held that municipalities are "persons," and therefore can be sued under 42 U.S.C. § 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). This Court also concluded in *Monell* that municipalities could not be sued under a *respondeat superior* theory.

Over the past two decades, at least four Justices of this Court have called for a reconsideration of *Monell.* Justice Stevens has argued on several occasions that *Monell* was wrongly decided, and that municipalities should be liable for the conduct of their agents under a *respondeat superior* theory. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting, stating that "in my opinion, the Court in *Monell* should simply have held that

municipalities are liable for the unconstitutional activities of their agents that are performed in the course of their official duties.") In 1997, Justices Souter, Breyer and Ginsburg, in two separate dissents, joined Justice Stevens in calling for a reexamination of *Monell*. *Board of the County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997).

The case *sub judice* presents an ideal vehicle to answer the call of Justices Stevens, Breyer, Souter and Ginsburg to reexamine *Monell* because it compellingly demonstrates the shortcomings of *Monell* that were discussed in the *Bryan County* dissents. *Monell* should be reexamined for the following reasons:

A. The legal prerequisites are present for reexamination of *Monell's* conclusion that 42 U.S.C. § 1983 does not allow *respondeat superior* liability.

Justice Breyer's succinct argument on this topic best states Petitioners' case:

> I believe that the legal prerequisites for reexamination of an interpretation of an important statute are present here. The soundness of the original principle is doubtful. The original principle has generated a body of interpretive law that is so complex that the law has become difficult to apply. Factual and legal changes have divorced the law from the distinction's apparent original purposes. And there may be only a handful of individuals or groups that have significantly relied upon perpetuation of the original distinction. If all this is so, later law has made the original distinction not simply wrong but obsolete and a potential source of confusion. (citations omitted).

Bryan County, 520 U.S. at 431.

B. *Monell* was wrongly decided on the basis of statutory interpretation and legislative history.

Justice Stevens has explained why § 1983 is *consistent* with *respondeat superior* liability. *Tuttle*, 471 U.S. at 836, n. 8, (Stevens, J., dissenting); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489-490 (1986) (Stevens, J., concurring in part and concurring in judgment). Justice Stevens' reasoning on this issue has been cited with approval by Justices Breyer, Stevens and Ginsburg in their *Bryan County* dissent. *Bryan County*, 520 U.S. at 431-432. As noted by these three Justices, "it is difficult to find Section 1983's words '[e]very person' inconsistent with *respondeat superior* liability." *Id.* at 432. Since Section 1983 requires that the wrongdoer either "subject" or "cause" another person "to be subjected" to a "deprivation" of a right, and since municipalities can only commit wrongs via the action of human beings, the law of agency suggests that municipalities should be liable for acts their employees take within the scope of their employment. *Id.* In several circumstances, Justice Breyer noted, federal courts have interpreted the word "person" or equivalent in other statutes as authorizing vicarious liability. *Id.* at 432-433 (citing *AT&T. v. Winback .and Conserve Program, Inc.*, 42 F.3d 1421 (3d Cir. 1994), *cert. denied*, 514 U.S. 1103 (1995) (Lanham Act); *American Soc. of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (Sherman Act); *United States v. A & P Trucking Co.*, 358 U.S. 121, 124-125 (1958) (criminal statute). See also *Tuttle*, 471 U.S. at 835 (Stevens, J., dissenting).

C. *Monell* has spawned an incredibly complex body of law that is confusing and unpredictable, resulting in inconsistent and unfair outcomes.

To avoid *respondeat superior* liability, this Court and others have had to "spin ever finer distinctions as we try to apply *Monell*'s basic distinction between liability that rests upon policy and liability that is vicarious." *Bryan County*,

520 U.S. at 430 (Breyer, J., dissenting). This "has produced a body of law that is neither readily understandable nor easy to apply," *Id.* at 433 (Breyer, J., dissenting), with legal outcomes that have often been inconsistent. For example, in *Bryan County*, the county sheriff was a final policymaker, but in another decision issued by this Court that year, the county sheriff was held *not* to be a county policymaker. *McMillian v. Monroe County*, 520 U.S. 781 (1997).

Justice Breyer has noted that "a basic legal principle that requires so many such distinctions to maintain its legal life may not deserve such longevity." *Bryan County,* 520 U.S. at 435 (Breyer, J., dissenting). Specific examples of these confusing distinctions appear below, in the discussion of the appeal court's misinterpretation of this Court's § 1983 decisions.

D. Given the ubiquity of indemnification provisions and practices, *Monell* fails to limit municipal liability, and in this case, might substantially *increase* the City's liability.

In *Bryan County*, Justices Breyer, Stevens and Ginsburg noted that many entities indemnify their employees, and called for briefing (in the proper case) on how indemnification might impact *respondeat superior* liability under § 1983. *Bryan County*, 520 U.S. at 436-37 (Breyer, J., dissenting). This case is an ideal vehicle for briefing the indemnification issue because (1) the Houston City Code contains a detailed indemnification provision (App. 88a)[1] that covers both of the individual defendants in this case, and (2) the appeals court remanded to the trial court Petitioners'

[1] This document was not part of the trial record because indemnification was not relevant at trial. Petitioners respectfully request that this Honorable Court take judicial notice of this document. The authenticity of this certified excerpt of the City of Houston Code is obviously not in dispute, and it is relevant to the argument being made by Petitioners herein. Thus it is appropriate for this Court to take judicial notice of this document for the purposes of this appeal.

claims against the individual defendants. Therefore, Petitioners will re-try against the individual defendants essentially the same case they already won against the City. If Petitioners win against the individuals, the City of Houston will pay the verdict because both individuals are indemnified under the City Code, and thus, the City of Houston's success in having the first verdict reversed may be worse than a pyrrhic victory. At retrial, the court could award not only the same actual damages but also impose punitive damages against the individuals. This is not simply a theoretical concern; while the jury was deliberating in the first trial, they submitted a question to the trial judge as to whether punitive damages could be assessed against the City.[2] In addition, even the appeals court opined that the conduct that was alleged against the individual defendants—and which the jury obviously found persuasive—was such that no reasonable city official could have thought it acceptable behavior (App. 45a and 62a). That holding, and the jury's question about the availability of punitive damages, raises the very real specter that the City's exposure at the second trial could be substantially greater than it was at the first trial.

E. The alternative to *Monell* will decrease municipal defense costs, enhance judicial consistency and fairness, and increase judicial economy.

The "no *respondeat superior* liability" conclusion also results in duplication of legal fees. For example, in addition to its own legal fees, the City paid two outside law firms to represent the individual defendants in this case. This additional—and substantial—cost to cities would largely be eliminated if *respondeat superior* liability were available. Under that circumstance, most plaintiffs would simply sue

[2] The answer, of course, was "no," pursuant to *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

the municipality, as would be the normal practice if one were suing a private-sector defendant. This would (1) simplify the lawsuit greatly, enhancing judicial economy, (2) enhance fairness by making outcomes more consistent, (3) lower legal fees significantly for both sides, which fees a city will likely pay if it loses, (4) shorten the time from filing of a lawsuit to its resolution, and (5) decrease pre- and post-judgment interest costs to municipalities.

These cost savings would largely compensate for any additional exposure resulting from the availability of *respondeat superior* liability. That is because, as noted above, *respondeat superior* liability is effectively available right now against municipalities via indemnification.[3] However, the circuitous route (via indemnification) by which cities now respond in damages markedly increases municipalities' transactional costs, and it often delays (and sometimes prevents) compensation to victims of unconstitutional government conduct. In essence, money that could go to compensate victims of governmental misconduct is wasted on transactional costs that benefit no one.

Municipalities may argue that recognizing *respondeat superior* liability will increase their liability, which would deplete public coffers. That concern is minimized by the existence of indemnification and by the cost savings discussed above. Moreover, that concern is minimized by three major advantages that governmental defendants would continue to have even if *respondeat superior* liability were recognized. The first advantage is that governments are not subject to punitive damages under § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The second advantage is that individual defendants would continue to retain their good-faith immunity even if *respondeat superior*

[3] In addition, there is already *respondeat superior* liability if the municipal wrongdoer is a policymaker under Section 1983.

liability were available. In other words, a municipality would only be liable on a *respondeat superior* theory if—as is the case today—a plaintiff could overcome the individual defendant's good-faith-immunity defense.

The third advantage which significantly limits municipal liability is that cities are not liable for negligent—or even grossly negligent—conduct. A municipality is liable under § 1983 only if the plaintiff shows that the policymaker and/or municipality exhibited "deliberate indifference," which has been understood to mean "intent":

> Deliberate indifference is thus treated, as it is elsewhere in the law, as tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes. Compare *Pembaur*, supra at 483, 106 S.Ct. at 1300 (plurality opinion of BRENNAN, J.)("deliberate choice" by policymaker) and *Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985) (plurality opinion of REHNQUIST, J.) ("'policy' generally implies a course of action consciously chosen") with *Canton*, supra, at 389, 109 S.Ct. at 1205 ("Only where a municipality's failure to train its employees. . .evidences a 'deliberate indifference' to the rights of its inhabitants can . . . a shortcoming be ... city 'policy or custom' ... actionable under §1983").

Bryan County, 520 U.S. at 419-420 (Souter, J., dissenting).

These three advantages collectively represent a much more meaningful limitation on Section 1983 liability than the "absence" of *respondeat superior*—which, as noted above, is not really "absent" much of the time.

F. Openly recognizing *respondeat superior* liability will act as a better deterrent to governmental unconstitutional conduct.

In *Owen v. City of Independence*, this Court stated that § 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." 445 U.S. 622, 651-52 (1980). Our jurisprudence has traditionally recognized *respondeat superior* liability largely because of the belief that by holding the employer liable, we increase the likelihood that the employer will "fix the problem." This should apply no less to municipal corporations than it does to business corporations, but municipalities that are held "not liable"—as was the City of Houston in this case because of the fiction of "no *respondeat superior* liability"—are sent the wrong signal. That wrong signal, of course, is that some "rogue employees" violated the constitution, but that the city itself is "fault-free."

In many cases, that conclusion itself is also a fiction. As is compellingly demonstrated by this case, constitutional misconduct is often not misconduct of "rogue employees," but rather, is a systemic problem. In this case, the systemic nature of the constitutional misconduct was shown by the following: (1) the "rogue employees" were a councilmember and a city policymaker[4] responsible for 200 employees and an $11 million budget, (2) the City withheld permits in direct violation of a court order, (3) the City violated Petitioners' Fourth Amendment rights on several occasions, including using a perjured affidavit to obtain a search warrant, the scope of which was far exceeded on the day of the search, (4) multiple City agents violated two progressively more stringent injunctions, which led the trial judge to hold the City in contempt and levy monetary sanctions against the City, (5) Petitioners complained to the City of Houston's Council on three occasions, the only result of which was that

[4] Whether Bea Link was a policymaker is disputed by the parties. The appeals court concluded she was not. On p. 20-24 of this Petition, Petitioners explain why Bea Link was a policymaker.

the Council voted to sue Petitioners, and (6) just before Yetiv' last appearance in front of Houston's City Council, that same council had voted to pay $210,000 to settle the Leath lawsuit.

One can hardly deem the above series of acts by dozens of City employees, lasting for several years, to be misconduct of "rogue employees." Furthermore, it was misconduct the Houston City Council was fully aware of—misconduct for which that Council had *just* voted to pay substantial monies to settle similar claims. Despite that, Council ignored Petitioners' repeated written and oral complaints and thus encouraged the same conduct to recur. Yet, despite all of these facts, the appeals court, basing its opinion largely on the "no *respondeat superior*" holding of *Monell*, held that there was no evidence that the City itself was liable. That conclusion sent the wrong message to a City that was obviously responsible for the constitutional misconduct that Petitioners suffered here. And that wrong message removed any incentive for the City to fix the systemic problem.[5]

QUESTION TWO

Should a city be held liable under 42 U.S.C. § 1983 where:

A. Petitioners complained about City agents' unconstitutional conduct directly to City Council, and the unconstitutional conduct continued thereafter?

And where

B. A City policymaker—who actually made policy, had 200 employees under her command, and was responsible

[5] Indeed, since the Texas Supreme Court denied review of this case, City agents have again begun harassing Petitioners, conducting illegal searches, threatening Yetiv's apartment staff with incarceration, and writing additional meritless criminal citations. Petitioners are now in the process of preparing yet another lawsuit against the City of Houston, a police officer and two of its building inspectors.

for an $11 million annual budget—was the individual that personally took and also directed unconstitutional actions against Petitioners?

And where

C. The City illegally implemented policies it had to search, to withhold repair permits from, and to demolish low-income property?

Even if *Monell* is not to be revisited, several issues regarding § 1983 pathways to municipal liability need to be clarified in order to render this body of law more intelligible, and hence, more predictable and fairer.

Monell and its progeny have held that there are essentially three pathways to attach liability to cities under § 1983, termed herein the **City Council**, the **Policymaker**, and the **Custom/Practice** pathways. This case is an ideal one to address the confusion arising from *Monell* and its progeny because here, all three pathways for attaching liability were proved at trial[6]. Despite that, the appeals court reversed based on its confusion as to what § 1983 requires a plaintiff to prove. The ensuing discussion demonstrates the need for this Court to clarify the pathways by which § 1983 liability may attach to municipalities.

A. Should a city be held liable under 42 U.S.C. § 1983 where Petitioners complained about City agents' unconstitutional conduct directly to City Council, and the unconstitutional conduct continued thereafter?

Petitioners initially complained to City Council by hand-delivering a complaint to all councilmembers on October 5, 1994. A few days later, Yetiv appeared on the local *Evening News* and alleged that Link and Huey were conducting

[6] The question of whether Link was a Policymaker was decided by the trial judge as a mixed question of law and fact. The trial judge, considering all evidence in the case, including any inferences drawn from the jury verdict, held that Beatrice Link was a policymaker.

illegal searches and withholding repair permits. The next day, Yetiv appeared in person before Houston's City Council, and answered several councilmembers' questions about his complaints. Two weeks later, the *Houston Chronicle* reported that the City of Houston had attempted to settle in secret the Leaths' lawsuit, which claimed that the City had illegally revoked their permits and demolished their apartments. After the story broke, the City Legal Department decided to follow procedure[7] and submit the proposed $210,000 settlement payment to Houston's City Council, which payment Council voted to approve.

Even without Yetiv's complaints and without the Leath settlement payment, Helen Huey's demolition drive in her district was well known to any councilmember who was awake. Huey was not shy about it. Indeed, she made it the centerpiece of a campaign photo, where she is shown leaning on a big sledgehammer. An article largely focusing on Huey's efforts to demolish many low-income apartment complexes in her district was entitled "Hammerin' Helen." In violation of the City Charter, which allows councilmembers to exercise only legislative power, Huey improperly controlled the City's permit-issuance machinery. For example, a print-out from the City's permit-issuance computer stated "No permits without CMHH or JHC approval." CMHH was an acronym for CouncilMember Helen Huey. Many internal Huey office memos had entries, some in Huey's own handwriting, pertaining to the revocation of valid permits of various apartment complexes in Huey's district, and of the "problem" which existed when apartments which were targeted by Huey for demolition—like the Leaths' apartments and Aspenwood—had valid permits. In the Leath situation, the City "solved" that "problem" by revoking the permits and then demolishing the apartment complex.

[7] Traditionally, all legal settlements exceeding $5,000 must be approved by City Council.

It is unfathomable that City councilmembers were unaware of the extensive print and television publicity which surrounded Huey's efforts to "clean up" her district.

Despite this evidence, the appeals court held that Petitioners had not proven the **City Council** pathway because that pathway is available only if "City Council (a) passed an ordinance or resolution that City employees followed in improperly withholding permits from Yetiv and AAC[8] and illegally searching the AAC apartments or (b) expressly ratified these employees' improper actions." App. 11a.

The appeals court is confused regarding the **City Council** pathway. This Court has held repeatedly that a *decision*—not a facially unconstitutional decision—by a City's legislative body attaches liability to a City:

> With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. ***No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body***—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of government policy.

Pembaur, supra, 475 U.S. at 480 (1986) (emphasis added), citing *Owen v. City of Independence*, 445 U.S. 622 (1980) and *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

The appeals court further stated that the City was not liable because "Council voted to sue AAC for repairing without a permit; it did not vote to withhold permits or to

[8] AAC is an acronym for Aspenwood Apt. Corp., the owner of the Aspenwood Apartments.

demolish or search AAC's or anyone's buildings. Moreover, not investigating Yetiv's claims is not an express ratification of anything." (App. 14a)

This statement constitutes error in three ways:

First, by concluding that "Council voted to sue AAC for repairing without a permit," the panel is accepting the City's version of the facts—a version that the jury did not believe. Giving deference to the verdict, the panel should have inferred that Council voted to sue Petitioners in order to 'protect one of their own," and please a fellow councilmember whose unconstitutional conduct was a means to further her own political agenda. That the City never pursued its lawsuit, and that the trial judge—as a result of *Petitioners' counterclaim—ordered* the City to provide permits to Petitioners, might explain why the jury did not believe the version of the facts relied on by the appeals court.

Second, and more importantly to this appeal, by stating that "Council did not vote to withhold permits or to demolish or search AAC's or anyone's buildings," the appeals court appears to have concluded that under § 1983, a City Council's action must be *facially unconstitutional* in order to attach liability. That the appeals court is confused can best be seen from *Owen*[9] and *Fact Concerts*[10] themselves. For

[9] Owen, the police chief in Independence, MO, was suspected of stealing City property, diverting narcotics and money held by the police, manipulating traffic tickets, and causing the "unusual release of felons." *Owen,* 445 U.S. at 628. A councilmember reviewed "voluminous reports" describing the investigation of these charges and reported to council. There was no evidence that any councilmember nor other city official bore any ill will toward the police chief. Council voted to request that the City manager "immediately take direct and appropriate action, permitted under the Code, against such persons as are shown by the investigation to have been involved.". *Id.* at 629. The City manager fired the police chief the next day.

[10] Fact Concerts, Inc., obtained a permit from the City of Newport to present concerts. Shortly before one concert, the group "Blood, Sweat and Tears" was hired by Fact Concerts as a replacement for a previously

example, this is how this Court explained why the City of Newport Council voted to cancel Fact Concerts, Inc.'s license to perform:

> Council then voted to cancel the contract because respondent had not "lived up to all phases of the agreement."

Id., at 252.

There was nothing facially unconstitutional about the City of Newport's Council vote to cancel a contract, yet this Court held that the Council's vote was sufficient to attach liability to the City.

Owen is yet another case from this Court that shows that a Council's action need not be facially unconstitutional in order to attach liability to a city:

> At the close of his statement, [Councilmember] Roberts moved that the investigative reports be released to the news media and turned over to the prosecutor for presentation to the grand jury, and *that the City manager* ***"take all direct and appropriate action"*** *against those persons "involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports."* After some discussion, the City council passed Roberts' motion with no dissents and one abstention.

Owen, 445 U.S. at 628-29 (emphasis added).

As in *Fact Concerts*, Council's vote in *Owen* was facially constitutional—Council simply voted to advise the city manager to take "direct and appropriate" action. Council

---

engaged performer. *Fact Concerts*, 453 U.S. at 252. The City was concerned because it had experienced crowd disturbances at previous rock concerts, and the City canceled Fact Concerts' license to perform. Fact Concerts obtained a court order enjoining the City from interfering with the performance of the concerts, which were then held as planned, without incident. Fact Concerts later obtained a §1983 jury verdict that its constitutional rights had been violated.

didn't even vote to fire Owen (which itself could have been facially constitutional). When the jury later decided that Owen's discharge was unconstitutional (on lack of due process grounds), the Council's vote to take "direct and appropriate" action simply attached liability for the City manager's subsequent unconstitutional action.

The appeals court's standard of refusing to attach liability based on council *inaction* is untenable. The appeals court held that for liability to attach via the **City Council** pathway either council's action must be facially unconstitutional or it must ratify employees' previous facially unconstitutional behavior. This holding is inconsistent with this Court's precedent, and furthermore, it is untenable because most conduct becomes "facially unconstitutional" only after the facts are resolved by a fact-finder. For example, in *Fact Concerts*, the City Council canceled the contract because it contended that Fact Concerts, Inc., had not "lived up to all phases of the agreement." In other words, the Council canceled a contract because it believed that the other party to the contract had breached it. There is certainly nothing facially unconstitutional about canceling a contract that has been breached by the other party. But when the jury concluded that the cancellation was actually based on impermissible First Amendment grounds, the City council's facially innocent action attached liability to that city.

Similarly, in *Owen*, there was nothing facially unconstitutional about the city council's vote requesting that the City manager "immediately take direct and appropriate action, permitted under the Code, against such persons as are shown by the investigation to have been involved." *Owen*, 445 U.S. at 629. Indeed, such a vote—at least on its face—shows civic responsibility by the councilmembers. Yet when the jury concluded that Owen's right to due process had been violated, Council's vote—even though it was not facially unconstitutional—attached liability to the City.

The same applies here. If anything, the facts here argue

for even clearer liability against the City of Houston, for these reasons:

- In *Owen*, Chief Owen was accused of very serious felonies, whereas here, Petitioners won, indicating that the jury found that Aspenwood and Yetiv had done nothing wrong. No such inferences existed in favor of Owen, yet he won his §1983 argument.

- In *Owen*, Council's vote did not direct the manager to take any adverse action against Owen—but rather, to take action against "persons involved in illegal, wrongful activities." Here, Council's vote to sue Petitioners implies that council concluded that City agents had done nothing wrong—and that Yetiv and Aspenwood had. This is much more of an endorsement of City agents' subsequent unconstitutional conduct than is "taking appropriate action" or "canceling a contract." Indeed, the appeals court should have concluded that Houston City Council's decision to sue Petitioners not only ratified *previous* unconstitutional conduct but also encouraged *subsequent* unconstitutional conduct by City agents.

- In neither *Owen* nor *Facts Concerts* is there any suggestion that a similar situation had previously occurred. Here, prior to voting to sue Yetiv and Aspenwood, Houston's City Council had *just* voted to pay the Leaths $210,000 to settle nearly identical claims.

Third, the appeals court is mistaken in its assertion that Council's "not investigating Yetiv's claims is not an express ratification of anything." (App. 14a). This statement is incorrect, as explained by this Court in *Fact Concerts* :

> ***Without attempting to investigate*** the nature of the group's music or the representations made by respondent [Fact Concerts], the Council voted to cancel the license for both days unless "Blood, Sweat and Tears" were removed from the program.

Fact Concerts, 453 U.S. at 251 (emphasis added).

Thus, this Court held that "failure to investigate" is important in the analysis of whether § 1983 liability should attach via the **City Council** pathway. This is logical because if a council is going to be the citizen's last resort, as it is in most cities, that avenue of relief would be meaningless if a city's council could be told of multiple constitutional violations and then simply ignore them—with impunity. Indeed, if a city council's inaction cannot attach liability to a city, then the incentive will always be for a city's council to do nothing, because according to the appeals court, if a city's council does nothing, that fully insulates it from liability.[11]

B. Should a city be held liable under 42 U.S.C. § 1983 where a City policymaker—who actually made policy, had 200 employees under her command, and was responsible for an $11 million annual budget—was the individual that personally took and also directed unconstitutional actions against Petitioners?

Although liability most clearly attaches to cities via action (or inaction) of their legislative body, misconduct by a **Policymaker** can also attach liability to a municipality. This Court has recognized that cities delegate most municipal "policymaking":

> Like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for

[11] It should be emphasized that unless a council's action is itself unconstitutional (which, realistically, it almost never is), a council's vote (or inaction) only *attaches* liability to a city—it does not create the liability. The plaintiff must still prove the underlying unconstitutional conduct in order to prevail. What council's awareness provides is a means to overcome the § 1983 "no *respondeat superior* liability" limitation.

> actions ordered by such officers exercising their policymaking authority is no more an application of the theory of *respondeat superior* than was holding the municipalities liable for the decisions of the City councils in *Owen* and *Newport*.

Pembaur, 475 U.S. at 483.[12]

The appeals court cites *Pembaur* for the proposition that one must make final policy in order to be a policymaker (App. 15a), but the facts in *Pembaur* suggest that *one need not make policy at all* to be a policymaker under §1983:

> In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the ***final decisionmaker*** for the county, and the county may therefore be held liable under § 1983.

Pembaur, 475 U.S. at 484-85 (emphasis added).

It is notable that although this quote refers to the "County Prosecutor," it was actually *Assistant* Prosecutor Whalen that was held to be a policymaker—even though as *Assistant* Prosecutor, *he could not make **any policy** under Ohio law.*

Link testified not only that she was a final decisionmaker, which was sufficient under the facts of *Pembaur*, but also that she established operating procedures and *actually made policy.* No such testimony can be found in the above cases.

Substantial summary judgment and trial evidence showed that Link was a policymaker:

First, in her summary judgment affidavit, Link testified that she derived her authority from the Comprehensive

[12] In *Pembaur,* the ***assistant*** county prosecutor recommended that police forcibly enter a doctor's clinic to serve capiases on two witnesses they believed were there. *Id.* at 483. This Court held the assistant prosecutor to be a policymaker even though the County argued that "the prosecutor lacked authority to establish municipal policy respecting law enforcement practices." *Id.* at 484.

Urban Rehabilitation and Building Standards ("CURB") ordinance, and that she had overseen enforcement of CURB since the day it was passed on Dec. 8, 1993. Link further testified that she managed an $11 million annual budget and supervised over 200 employees, and that during her 20 years of employment with the City,

> I have studied and reviewed City Ordinances and State laws extensively. I have also studied ordinances regulating substandard and dangerous buildings of other Cities, recommended changes to the City and Local Government and provided expert testimony before State legislative hearings and proposed changes to State Laws.
>
> To meet the division's responsibilities, the Assistant Director [Link] is required ***to establish operating procedures for enforcing City Codes***. For example, the Assistant Director has the authority to ***establish procedures*** for inspection and abatement work performed by the City. The exercise of judgment and discretion with respect to these ***policies and procedures*** could have significant impact on the health and safety of the public.

(emphasis added). In summary, Link testified under oath that she used her discretion and judgment to establish "policies and procedures" in the very areas of the City's business that were challenged in this lawsuit. One could scarcely imagine a more compelling statement of policymaking.

Second, at trial, Link testified that she has been delegated power by the Building Official to "determine what type of action should be taken to enforce City Codes." Link further testified that she exercised this power in Aspenwood's case by determining (1) whether she would grant extensions to Aspenwood, (2) whether she would require that Aspenwood post a $2200 bond, (3) whether she would enter an agreement with Aspenwood regarding repairs, and (4) whether she would give—or withhold—permits from

Aspenwood. It is undisputed that Link withheld Aspenwood's permits.

Third, the following trial testimony also shows that Link made policy:

QUESTION: [asking Link about paragraph 5 in her affidavit] You said to meet the division's responsibilities, assistant director [Link] is required ***to establish operating procedures for enforcing City Codes***. Have you, in fact, established some of those operating procedures?

LINK'S ANSWER: ***Yes, I have***.

QUESTION: Have you done that independently or is it done within a committee environment or how does it work?

ANSWER: It's done with the consultation of the managers within the division.

QUESTION: But it's your call in the final analysis?

ANSWER: Yes.

The following also shows that Link made policy:

QUESTION: Ma'am, would you flip to the third page and look at point [affidavit paragraph] No. 6? You have stated here inspection personnel, not the assistant director, are responsible for determining whether a violation exists. Issuing notice by certified mail to owners. Is that ***one of the procedures you have established*** that whenever violations are found, a notice is sent to the owner by certified mail?

LINK'S ANSWER: ***Yes***.

QUESTION: And you have trained your staff to do it that way?

ANSWER: Yes.

Link's own sworn affidavit and her trial testimony (both of which the trial judge considered in ruling on the policymaker issue), show that Link had power under CURB to be both a policymaker and a final decisionmaker, and that, in fact, she made policies and also made the decision to withhold permits and unconstitutionally search Aspenwood.

Finally, a post-*Pembaur* decision of this Court explained

that a "policymaker" is someone not subject to *effective* review procedures. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 145 (1988) (Brennan, J., concurring in the judgment). As Link herself stated in a letter to Yetiv, there was no effective means within the City of Houston to review her decisions. In her Aug. 22, 1994, letter to Yetiv, in response to Yetiv's question on how her decisions could be appealed, Link stated:

> If there is a disagreement regarding a default in the future or progress of the job, the disagreement will be resolved by City inspectors. The mechanism to appeal the City's [Link's] decisions regarding the progress of the job is District Court.

Although Link failed to disclose that her decisions could be appealed to City Council—or anywhere else, other than District Court—Petitioners appealed to City Council on three occasions, but all that resulted from that was that Petitioners got sued by the City.

Obviously, Link was correct when she said that the only way to appeal her decision was by going to court.

C. Should a city be held liable under 42 U.S.C. § 1983 where the City illegally implemented policies it had to search, to withhold repair permits from, and to demolish low-income property?

Whether there is a § 1983 custom or practice is a jury question. *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984), *Bennett v. City of Slidell*, 728 F.2d 762, 767-68 (5th Cir. 1984). Despite that, the appeals court disregarded substantial evidence in the record showing a custom and practice of withholding permits, favoring demolition and conducting improper searches. The appeals court also concluded that repeated unconstitutional actions taken *against Petitioners* by dozens of City agents over several years cannot be used to show custom and practice. In other words, the appeals court erroneously concluded that only

actions against others (but not actions taken against the plaintiffs in a specific case) can be used to prove policy and custom. This Court has never suggested that a city gets a "free pass" for repeated unconstitutional actions it takes against the plaintiffs in a certain case, nor would this requirement make any sense. The extensive, repeated, and long-lasting constitutional misconduct aimed at Petitioners in this case should certainly be considered in determining whether a policy or custom existed. Some of the evidence that supports the jury's conclusion in the instant case that there was a custom or practice to withhold permits, demolish and to conduct illegal searches includes:

- The fact that the only way that Petitioners were able to get the building permits was by suing the City and obtaining a court order to force the City to issue permits.
- Withholding permits a second time, even in violation of a court order compelling the City to issue them.
- Lying by City inspectors in a sworn affidavit in order to get a faulty search warrant, the scope of which was far exceeded when 30 City inspectors, demolition contractors and armed police officers executed it.
- The multiple improper inspections made, leading to three progressively more stringent injunctions and a finding of contempt and assessment of sanctions against the City.
- The statement by one of the City's own inspectors (Inspector Watson) that the City's tactics against Petitioners constituted "Gestapo tactics."
- The 25 citations written to Yetiv by four different City inspectors, all of which were dismissed when none of the inspectors showed up to the three different court dates.
- Link's invention of a complaint that Aspenwood was dumping asbestos-containing materials in the public street, an allegation that was proven false by the City's *own* asbestos inspector.

- The vote by City council to sue Petitioners—instead of making sure that Petitioners got the building permits they had been trying to get for six months.

- The fact that City council itself voted to pay the Leaths $210,000 to settle their § 1983 lawsuit on nearly identical facts.

In addition to the above, Petitioners offered into evidence a Feb. 17, 1993, memorandum prepared by the Director of the City of Houston Planning and Development Department. This memo was addressed to the Mayor and "All City Councilmembers" and described a survey of 587 square miles which identified 11,710 buildings which were allegedly "hazardous." The concluding paragraph stated: "We notified the Legal Department in December of this effort and will now move forward aggressively to identify owners and ***push for demolition***."[13]

Despite the above, the appeals court concluded "the only evidence of any custom or usage of demolishing or searching low-income housing or withholding permits involves the Aspenwood Apartments and the Leaths's buildings." (App. 24a). The panel acknowledged that the City withheld permits from the Leaths and from Petitioners and that both the Leath and Yetiv/Aspenwood evidence of custom and practice were known to council (*Id.*). Even if the Leath/Yetiv/Aspenwood evidence were the only evidence proving these customs and practices—which it was not—it should have been enough because of the repeated nature and egregiousness of the

[13] Although Petitioners offered this document, the trial judge did not admit it. Petitioners preserved error at trial via a bill of exceptions, but did not raise this issue in their appeal (dealing with the Huey/Link summary judgment) because they were satisfied with the jury verdict. Once the appeals court reversed, Petitioners asked the court to consider the evidence in their bill of exceptions, but the court refused to do so. Petitioners raise this not as a separate appeal issue, but so that if this Petition is granted, this Court will consider the evidence in their bill of exceptions.

violations. *Bennett v. City of Slidell*, 728 F.2d 762, 767-68 (5th Cir. 1984):

> *Where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of the conduct, to be satisfied that diligent governing body members would necessarily have learned of the objectionable practice and acceded to its continuation.* Knowledge of a continuing practice of city employees may be attributed to the governing body in one of two ways. Actual knowledge may be shown by such means as ***discussions at council meetings or receipt of written information***.

(emphasis added). Therefore, if the practice or custom is "flagrant or severe" or if council has actual knowledge of the conduct, custom and practice is established. The instant case is easy since the conduct (including numerous intentional violations of court orders by multiple city agents) was flagrant *and* City Council had *actual* knowledge of both the Leath and Aspenwood matters. What happened to the Leaths was egregious, so much so that the City tried to settle that case in secret. And by the time Yetiv complained to Houston's Council, Council already had actual knowledge of the wrongful revocation of permits and demolition of the Leath apartments.

The appeals court cites a single case in support of its "no policy/custom" conclusion, and describes the holding of that case as follows: "no well-settled, widespread custom existed when about 12 racial-harassment incidents occurred over two and one-half years and high-ranking officials learned of occasional incidents." (App. 24a). *Hamilton v. Rodgers*, 791 F.2d 439, 443 (5th Cir. 1986).

The *Hamilton* case is entirely distinguishable. First, the appeals court's citation of the holding is inaccurate. The Fifth Circuit actually said this:

Perhaps a dozen incidents arose within the two and a half

> years preceding Hamilton's suspension; no continual pattern therefore arose *that would warrant the imputation of constructive knowledge to high ranking officers of the Fire Department.*

(emphasis added). Thus, in *Hamilton*, the Fifth Circuit was concerned that there were not enough racial incidents for the municipality (the defendant in *Hamilton* was again the City of Houston) to have become aware of the problem. Obviously, that is entirely distinguishable from the instant case where the City of Houston Council had voted to pay $210,000 to settle the Leath lawsuit and was informed by Yetiv of the unconstitutional conduct against him and Aspenwood. Thus, Council had actual knowledge of repeated constitutional misconduct, and there was no issue of "imputing constructive knowledge."

Secondly, the *Hamilton* court—unlike the appeals court in the instant case—did not have a problem with the fact that all the racial incidents were directed at the plaintiff in that case. The *Hamilton* court did not require there to be other "victims" of the City of Houston's constitutional misconduct.

Finally, the Fifth Circuit noted that when supervisors became aware of the racial abuse directed at Hamilton, "they promptly acted to discourage them, reprimanding those responsible and noting the incidents in the offenders' files." *Id.* In contrast, when Yetiv advised Council of the constitutional misconduct here, Council sued him.

In summary, Petitioners here adduced more than enough evidence to sustain the finding that the City of Houston had a policy of conducting illegal searches, of withholding or revoking permits, and of improperly demolishing apartments.

CONCLUSION

In this case, the jury found that the City of Houston

violated Petitioners' Fourth, Fifth and Fourteenth Amendment rights by withholding building repair permits and illegally searching Aspenwood's property. Petitioners did everything a reasonable property owner could possibly do to get permits, but it was only by suing the City that Petitioners were finally able to get those permits. Instead of issuing the permits, the City marshalled the full force of its police power and retaliated with a massive raid more fitting of a drug bust of a narcotic kingpin rather of a city's dealing with a law-abiding businessman trying to rejuvenate low-income apartments.

The court of appeals indulged multiple inferences against the jury verdict, misinterpreted this Court's decisions and erred in concluding the City of Houston was not liable, thus vitiating §1983. The appeals court concluded that the City is not liable for the unconstitutional conduct found by the jury even though Yetiv complained three times to City council about the permit-withholding and illegal searches. Contrary to *Owen* and *Fact Concerts*, the appeals court concluded that the fact that Houston City Council ignored Yetiv's complaints was not sufficient to attach liability to the City.

The appeals court has provided a recipe to cities on how to avoid § 1983 liability. First, a City must pass an ordinance stating that the conduct of every city employee is subject to appeal to City Council. That means, according to the appeals court, that no City agent could be a policymaker since there is theoretical review of every city employee. According to the appeals court, one need not worry if the oversight is real or imagined—as it was in this case. Second, City Council must not take any action regardless of the nature of the complaints that are brought to it because inaction is not actionable under § 1983.

This is not the state of § 1983 law. Council's ignoring Yetiv's complaints about unconstitutional conduct—which complaints the jury found to be valid—made the City liable for subsequent similar unconstitutional conduct. In this case, Council had actual knowledge of this conduct and instead of

putting a stop to it, Council "shot the messenger." In addition, Link was clearly a policymaker whose misconduct attached liability to the City. Finally, Petitioners proved that city agents illegally implemented against Petitioners City policies to search and withhold building repair permits.

This case was an egregious display of the abuse of governmental power, and is precisely the sort of case that § 1983 was meant to redress. Petitioners respectfully request that this Honorable Court grant their Petition, and then reinstate the jury's verdict in favor of Petitioners.

September 24, 2002.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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June 27, 2002

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Mr. Jeff D. Lefkowitz
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RE: Case Number: 02-0229
Court of Appeals Number: 01-97-01378-CV
Trial Court Number: 94-59707

Style: ASPENWOOD APT. CORP. AND JACK YETIV
v.
CITY OF HOUSTON

Dear Counsel:

Today, the Supreme Court of Texas denied both petitions for review in the above numbered and styled case.

Sincerely,

John T. Adams, Clerk

by Blanca E. Morin
Blanca E. Morin, Deputy

cc: Ms. Margie Thompson, Clerk
Mr. Charles Bacarisse
Mr. Jack Yetiv

APPENDIX B

Court of Appeals of Texas, Houston (1st Dist.).

The CITY OF HOUSTON, Appellant,
v.
ASPENWOOD APARTMENT CORPORATION and Jack Yetiv, M.D., PH.D., Appellees.
ASPENWOOD APARTMENT CORPORATION and Jack Yetiv, M.D., PH.D., Appellants,
v.
Beatrice LINK and Helen Huey, Appellees.

No. 01-97-01378-CV.

Aug. 27, 1999.

On Appeal from the 215th District Court, Harris County, Texas, Trial Court Cause No. 9459707.

Panel consists of Justices COHEN, HEDGES, and NUCHIA.

OPINION

MURRY B. COHEN, Justice.

***1** The City of Houston appeals from a judgment against it for $340,000 actual damages for section 1983[1] violations and a judgment declaring parts of the City's Comprehensive Urban Rehabilitation and Building Minimum Standards (CURB) ordinance unconstitutionally vague. Dr. Yetiv and Aspenwood Apartment Corporation (AAC) appeal from summary judgment on their claims against Beatrice Link, Assistant Director of Neighborhood Protection, and

---

[1] 42 U.S.C. § 1983 (1999) (relevant portion not substantively changed by 1996 amendment).

former Houston City Council member Helen Huey in their individual capacities. We reverse the section 1983 judgment against the City, render judgment that Yetiv and AAC take nothing on those claims, and dissolve a related injunction. We also reverse the judgment declaring various CURB provisions unconstitutional and dissolve a related injunction. Finally, we reverse the summary judgments in favor of Link and Huey and remand for determination of the claims against them.

BACKGROUND

Yetiv is the sole shareholder and officer of AAC. Sometime before April 1994, AAC was considering purchasing a low-income apartment complex (the AAC apartments) in Huey's council district. Yetiv knew that buildings C, D, E, G, J, K, L, M, and N of these apartments were under a Houston Building and Standards Commission's (BSC) dangerous building order (DBO) of November 3, 1993. The DBO ordered the property owner to obtain building permits within 30 days, begin repairs on the nine buildings within 90 days, and complete repairs within 210 days from the DBO's date. The DBO provided that, if the owner did not comply, the City could remedy, alleviate, or remove any substandard building.

Before purchasing the apartments, Yetiv decided to meet with Link to discuss the DBO. They met on April 5, 1994. At that meeting, Yetiv asked whether the DBO's timelines could be extended for six months beyond their scheduled expiration date of June 3, 1994. Link testified that she told Yetiv that, to get an extension, he would need to submit a "cure plan" (list of repairs) for all condemned buildings and to complete an extension request form, which required the owner (1) to post a bond if the DBO's timelines had expired; (2) to attach a cure plan; and (3) if he had

not obtained permits to repair or demolish the building, to get an occupancy inspection to determine the repairs to be made. In contrast, Yetiv testified Link told him that only a cure plan for some of the condemned buildings and the completed extension request form were required for an extension. Yetiv submitted a cure plan for only four of the buildings, testifying that Link told him to limit the cure plans only to the buildings that he could realistically complete within the extension period.

Link said she told Yetiv in May 1994 that AAC's application was deficient because it needed cure plans for all nine buildings. Yetiv denied Link required cure plans for all nine buildings. On May 20, Yetiv submitted a revised cure plan, which Link again rejected. For disputed reasons, the extension was never approved, and the DBO's timelines expired on June 3, 1994.

***2** After the DBO's timelines expired, the Building Inspection Division placed a "hold" on the AAC apartments, preventing issuance of repair or building permits. The parties dispute whether AAC needed an occupancy inspection before executing a bond agreement to have the hold lifted. Again for disputed reasons, AAC never received an occupancy inspection or submitted another amended cure plan, although it posted a bond. During this time, AAC did some work on some of the condemned buildings without permits. Yetiv contended this was work for which permits were not required or was cleaning; the City, Link, and Huey disagreed.

Yetiv and AAC's relationship with Link and Huey continued to deteriorate. Yetiv and AAC contended that Link would not respond to many of Yetiv's communications, denied him permits without reason, and improperly placed holds on the AAC apartments.

Yetiv and AAC also contended Link and Huey had the apartments watched or inspected frequently, they ordered meritless inspections, Huey pushed for the AAC apartments' demolition to gentrify her district, Huey would not return many of Yetiv's communications, and Link and Huey misinformed City Council about AAC's case. Link and Huey disputed these claims.

On October 11, 1994, Yetiv appeared before City Council to complain about Link and CURB, after having complained similarly on television the night before. Shortly thereafter, on October 27, 1994, the Building Inspection Division conducted a mass inspection of the AAC apartments under a search warrant. The City, Link, and Huey contended the inspection was to determine if AAC was doing repairs without permits, and they denied the inspectors lied to obtain the search warrant or had illegally entered AAC's property to collect information for that warrant. Yetiv and AAC claimed the inspectors illegally entered their property after Yetiv's City Council presentation, issued meritless citations to harass and retaliate against him, and lied in the warrant's supporting affidavit.

In December 1994, the City sued Yetiv and AAC to enjoin them from repairing the AAC apartments without permits. Shortly afterwards, AAC submitted revised cure plans, which were approved, for buildings C, D, and F. Yetiv then sought a temporary injunction to compel the permits' issuance. At the hearing, the parties signed an agreed order, acknowledging that AAC had submitted sufficient information for permits to issue on buildings C, D, and F, and stating that the City would approve information submitted on the remaining buildings if the building official determined the information for them was substantially similar to that submitted for buildings C, D, and F. The City and

AAC had fewer problems until October 1995, when Link placed another hold on the AAC apartments. Link claimed AAC had allowed certain permits to expire, but Yetiv and AAC claimed the City violated the agreed order. In March 1996, AAC submitted a cure plan that met the City's approval. Yetiv sought another injunction in April 1996 to compel the permits' issuance, and, a few days later, the permits were issued. AAC has had no further problems obtaining permits since April 1996. In December 1996, an inspector came to another of Yetiv's properties in Huey's district. Yetiv then obtained a temporary injunction preventing inspections at any of his apartment properties without his or the judge's permission. The ancillary judge eventually held the City in contempt because it violated the agreed order by continuing inspections.

***3** Yetiv and AAC counterclaimed against the City, joining Huey and Link as counterdefendants,[2] alleging malicious prosecution and abuse of process;[3] tortious interference with contracts between AAC and its tenants and employees; and section 1983 claims for unconstitutional "taking" of their property, retaliation for asserting First Amendment rights, illegal searches, and due process violations. They also sought a declaratory judgment for "takings" and due course of law violations under the Texas Constitution caused by improperly withholding permits. Yetiv and A[illegible]ght actual and punitive damages, attorney's [illegible], an injunction requiring the City to issue building permits to AAC, and a declaration that CURB was

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[2] Huey and Link were sued in their individual and official capacities.

[3] AAC's counterclaim was dropped before summary judgment was granted, and Yetiv and AAC admit this on appeal.

unconstitutional because it discriminated against minorities.

In June 1997, the trial judge granted summary judgment for Huey on all claims asserted against her individually and for Link on all state-law claims against her individually. In July 1997, Yetiv and AAC nonsuited their federal-law (section 1983) claims against Link. In August 1997, the trial judge granted partial summary judgment for Yetiv and AAC, declaring CURB sections 10- 361(a)(3, 5, 6, 7, 8, 10) and 10-361(b)(1, 2) unconstitutionally vague and enjoining their enforcement.

Yetiv and AAC proceeded to trial against the City only. The jury was charged only on Yetiv's section 1983 claim against the City for First Amendment retaliation and on AAC's section 1983 claim against the City for illegal searches and permit withholding.

After finding that the City did not retaliate against Yetiv for asserting his First Amendment rights, the jury found that the City (1) searched the AAC apartments without a search warrant or beyond any warrant's scope and (2) arbitrarily or capriciously denied or withheld permits for work on the AAC apartments. The jury found AAC's actual damages to be $3,000 for the unlawful searches and $337,500 for withheld permits. The trial judge rendered final judgment (1) incorporating the jury verdict; (2) awarding AAC $340,500 actual damages against the City; (3) incorporating the partial summary judgment declaring the challenged CURB sections unconstitutional for vagueness and enjoining the City from the provisions' enforcement; (4) awarding $70,000 attorney's fees for Yetiv's CURB challenge and $99,450 attorney's fees for AAC's section 1983 claims (plus up to $120,000 attorney's fees contingent on appeal), pre- and post-judgment interest, and costs

against the City; (5) incorporating the summary judgments in favor of Link and Huey, individually, and dismissing without prejudice Yetiv and AAC's section 1983 claims against Link; and (6) issuing a permanent injunction ordering the City

> to desist and refrain from conducting ANY inspection, other than those related to construction and/or renovation of buildings of the [AAC apartments], UNLESS the inspections are authorized by a Court or by Dr. Yetiv, in writing. Nothing in this Order restricts the City of Houston Fire Department or Police Department or another City department or agency from responding to any emergency assistance requests from the aforementioned properties.

***4** The City appeals from the portion of the judgment declaring parts of CURB unconstitutional and assessing damages against it on AAC's section 1983 claims, and Yetiv and AAC appeal from the summary judgments in favor of Huey and Link.

THE CITY'S APPEAL

A. Section 1983

In issues one through three, the City argues (1) the evidence was legally and factually insufficient to establish its liability to AAC under section 1983, (2) the trial judge erred as a matter of law in ruling Link was a "final policymaker," and (3) the trial judge erred in submitting the following jury questions because they impermissibly allowed the jury to find the City liable solely on Link's decisions or on respondeat superior:

> *Jury Question No. 2:* Do you find that the City of Houston undertook one or more searches of [AAC]'s property without a search warrant which was based on a truthful affidavit and/or that such searches were beyond the scope of the warrant through decisions of Beatrice Link, the Houston City Council

and/or through a pattern, practice, policy or custom in the City?

Jury Question No. 3: Do you find that the City of Houston arbitrarily and/or capriciously denied or withheld permits for authorization to work on its buildings to [AAC], through decisions of Beatrice Link, the Houston City Council and/or through a pattern, practice, policy or custom in the City?

The charge contained the following instruction, as well:

A City is liable for an unconstitutional governmental policy, custom, ordinance, regulation, or decision. Therefore, if you find that Dr. Yetiv and/or [AAC] was injured as the proximate result of [the City's] policy, custom, ordinance, regulation, or decision, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, then the City itself will be liable. In particular, [the City] is legally responsible for any policy, custom, ordinance, regulation, or decision endorsed by City Council. If you find that City Council action or inaction violated Dr. Yetiv's and/or [AAC's] constitutional rights, [the City] is liable for such violations.

Even if you determine that the particular policy was established for a single occasion, you may still find that it represented an official policy of the City, provided that a deliberate choice to follow a course of action was made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. [The City] is responsible for policies or practices of its employees if City Council knew or should have known about an unlawful "pattern" of conduct by City employees.

We follow the usual standard of review for factual sufficiency of the evidence and for legal sufficiency of the evidence supporting issues on which the City did

not have the burden of proof. *See* Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 275-76 (Tex.1995) (legal sufficiency); Cain v. Bain, 709 S.W.2d 175, 176 (Tex.1986) (factual sufficiency).

***5** The trial judge ruled as a matter of law, over the City's objection, that Link was a final policymaker for purposes of the City's liability under section 1983. The charge then allowed the jury to find the City had violated AAC's rights if (1) a City Council decision did so, (2) Link did so, or (3) the City Council actually or constructively knew of a pattern or custom of City employees doing so.

1. Municipal Liability under Section 1983

A city may not be held liable under section 1983 on a respondeat superior theory. Monell v. Department of Soc. Servs. of the City of New York, 436 U.S. 658, 692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). Rather, a city may be held liable only when an injury was inflicted pursuant to governmental policy or custom. City of St. Louis v. Praprotnik, 485 U.S. 112, 121-22, 108 S.Ct. 915, 923, 99 L.Ed.2d 107 (1988) (plurality). If an unconstitutional action implements or executes even a single policy statement, ordinance, regulation, or decision of

a. the city's legislative body or

b. a city official responsible for establishing final policy with respect to the subject matter in question (a "final policymaker"),

the action is the city's "policy." Monell, 436 U.S. at 690-91, 98 S.Ct. at 2035-36; Pembaur v. City of Cincinnati, 475 U.S. 469, 482-83, 106 S.Ct. 1292, 1299-1300, 89 L.Ed.2d 452 (1986); *see* Praprotnik, 485 U.S. at 123, 127, 108 S.Ct. at 924, 926 (single final policymaker decision suffices). Similarly, if the city legislative body or final policymaker expressly ratifies a subordinate's decision and the basis for it,

the subordinate's decision will become city policy. *Praprotnik*, 485 U.S. at 127, 128, 108 S.Ct. at 926, 927.

Finally, if an unconstitutional custom or usage of city employees is persistent, widespread, permanent, and well-settled, it is the city's "custom" even when it is not approved by or based on a decision of the city's legislative body or final policymaker. *Monell*, 436 U.S. at 690-91, 98 S.Ct. at 2036; *Praprotnik*, 485 U.S. at 122, 108 S.Ct. at 923; *Pembaur*, 475 U.S. at 483, 106 S.Ct. at 300; *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir.1984).

In summary, the City can have section 1983 liability here only if

i. City Council (a) passed an ordinance or resolution that city employees followed in improperly withholding permits from Yetiv and AAC and illegally searching the AAC apartments or (b) expressly ratified these employees' improper actions;

ii. Link was a final policymaker who (a) made a decision or policy statement that city employees followed in improperly withholding permits from AAC and Yetiv and illegally searching the AAC apartments or (b) expressly ratified these employees' improper actions; or

***6** iii. There was a persistent, widespread, permanent, and well-settled custom or usage of city employees' improperly withholding permits from and illegally searching low-income housing.

2. Did City Council Expressly Adopt an Unconstitutional Policy or Expressly Ratify Subordinates' Unconstitutional Actions?

The City first claims there was no evidence of improper conduct by the City Council. We agree.

Yetiv and AAC cite the following alleged City policies as evidence of unconstitutional policy or ratification of subordinates' unconstitutional actions: (1) a policy to demolish low-income housing, (2) a policy wrongfully to withhold building and repair permits, and (3) a policy for inspectors illegally to search Houston residents' housing. We look for evidence of these three policies.[4]

Yetiv and AAC point to the following evidence they claim shows that Houston City Council promulgated or adopted these three policies:[5]

. Council's approval of a 1994 secret settlement with the Leaths, other apartment owners in Huey's district, whose apartments were demolished;
. An October *Houston Chronicle* article discussing the above settlement's sealing;
. Huey's campaign photograph, showing her leaning upon a sledgehammer and stating, "From putting a sledgehammer to dangerous buildings to diplomatic negotiations ... Helen's two years at City Hall have been busy and productive....";

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[4] Yetiv and AAC did not submit a jury question on demolition. However, we construe Yetiv and AAC's argument to be that evidence that the City wanted low-income housing demolished would also be indirect evidence that the City wrongfully withheld building permits for low-income housing, *i.e.*, if permits were withheld, repairs could not be done, and buildings could be demolished. Therefore, we review the evidence supporting a "demolition" policy.

[5] The remaining "evidence," omitted from our discussion, on which Yetiv and AAC rely was either attached to a pleading, a summary judgment response, or included in a bill of exceptions and was not, therefore, before the jury. Yetiv and AAC do not complain on appeal of the exclusion of any evidence in their bill. In a sufficiency review, we cannot consider any of the items not before the jury.

. A Huey staff member's notation: "I spoke to [a constituent] about [the AAC apartments]. Told her that you were on staff and your only focus is on dangerous buildings and apartment complexes. She was pleased to know that you were working to get these dumps gone from District A";
. An August 1993 filenote from an unidentified person who accompanied an inspector to the AAC apartments, stating in part, "The largest problem that will be faced by the City when they present their case [at a BSC hearing] on all the additional buildings is that they all have repair permits out on them. The City will be asking for a 'repair or demolish' order, and the fact that repair permits are in existence will work almost like an absolute defense ...";
. A neighbor's deposition, stating that he and other neighbors tried to have the AAC apartments demolished;
. Videotape and text of, and a handout from, Yetiv's October 11, 1994 presentation to City Council, discussing Link's alleged harassment of him, noting an incident when inspectors entered his property without permission, suggesting CURB amendments that would preserve low-income housing, and claiming CURB as written and enforced disproportionately targeted poor minorities and discouraged the purchase of low-income properties.
. Videotape of a local news interview with Yetiv, in which Yetiv discussed Link's alleged harassment of him and stated that CURB discouraged the purchase of low-income housing.

Only the first of these seven acts is conduct by the City, and it is not evidence of a City Council "policy statement, ordinance, regulation, or decision" regarding the AAC apartments. *See* *Monell*, 436 U.S. at 690, 98 S.Ct. at 2036. It does not show Council's "deliberate choice to follow a course of action ... from

among various alternatives," *i.e.*, an express decision by Council. *See* *Pembaur*, 475 U.S. at 483, 106 S.Ct. at 1300. Furthermore, Huey's actions are not those of the City Council. *See* City of Houston Charter, art. VII, § 3 (Act of 1905; added by amend. Aug. 15, 1942; amend. Aug. 11, 1979; amend. Aug. 14, 1982) (Council acts only by ordinance, resolution, or motion, passed by majority vote). To hold otherwise would be to hold the City responsible under the doctrine of respondeat superior. The law prohibits that. *Monell*, 436 U.S. at 692, 98 S.Ct. at 2036.

***7** Yetiv and AAC next contend that Council ratified subordinates' actions by (1) voting to sue AAC and (2) not investigating Yetiv's claims. Council voted to sue AAC for repairing without a permit; it did not vote to withhold permits or to demolish or search AAC's or anyone's buildings. Moreover, not investigating Yetiv's claims is not an express ratification of anything.

We distinguish *Owen v. Independence*[6] and *Newport v. Fact Concerts, Inc.*,[7] on which Yetiv and AAC rely. In *Owen*, in which the Court considered whether qualified immunity applies to a city under section 1983, the city council passed a motion for the city manager to take "appropriate action" against the police chief, which resulted in his firing, and to release reports concerning the matter; the constitutional injury arose directly out of this vote. *Owen*, 445 U.S. at 628-29, 100 S.Ct. at 1404. In *Fact Concerts*, in which the Court considered whether section 1983 allows punitive damages, the city council voted to cancel Fact Concerts's license; again, the constitutional injury arose directly out of that vote. *Fact Concerts*, 453 U.S. at 250-51, 101 S.Ct. at 2751. Here, the constitutional injury the jury found did not

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[6] 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

[7] 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

arise out of Council's vote to sue AAC for repairing without a permit, and Yetiv and AAC point to no evidence that Council voted, as the city councils did in *Owen* and *Fact Concerts*, to withhold permits or demolish or search anyone's housing.

We hold the evidence on which Yetiv and AAC rely is no evidence that Houston City Council executed a policy statement, ordinance, regulation, or decision to demolish or illegally search low-income housing or withhold permits. Therefore, we also hold the trial judge erred in submitting that portion of jury questions two and three allowing a finding of City liability based on City Council's actions.

3. Was Link a Final Policymaker Who Could Adopt an Unconstitutional Policy or Ratify Subordinates' Unconstitutional Actions?

The City next argues it cannot be liable for Link's actions because she was not a final policymaker.

For the City to be liable for any unconstitutional actions by Link, Link had to have the authority to make final policy in that particular area of the City's business. *E.g.*, *Praprotnik*, 485 U.S. at 127, 108 S.Ct. at 926. This is a preliminary legal question the judge makes by reviewing relevant state and local law and custom or usage having the force of law. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738, 109 S.Ct. 2702, 2724, 105 L.Ed.2d 598 (1989); *Praprotnik*, 485 U.S. at 124, 108 S.Ct. at 924. Final policymaking authority may be granted directly by legislative enactment or may be delegated. *Pembaur*, 475 U.S. at 483, 106 S.Ct. at 1300 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). Yetiv and AAC contend both happened here.

***8** Under the applicable statutes and ordinances, Link was not a final policymaker either for permit issuance or demolition decisions.[8] State law gives municipalities authority to adopt ordinances--a city council action-- requiring, among other things, securing, repairing, removing, or demolishing substandard, hazardous, or dilapidated buildings. Tex. Local Gov't Code Ann. § 214.001(a) (Vernon Supp.1999). The Houston City Charter vests power to enact and enforce ordinances protecting life, health, and property and removing and abating nuisances in the City Council, and the power to enforce laws and ordinances in the mayor. City of Houston Charter, art. II, § 2(a) (Act of 1905; amend. Oct. 15, 1913); art. VI, § 7a(1) (Added by amend. Jul. 26, 1947; amend. Jan. 27, 1968).

Link was the assistant director of the Neighborhood Protection Division, an executive position with discretionary authority under the Director of Public Works. As assistant director, Link testified she oversaw enforcement of the City's health and safety codes, which responsibility included establishing enforcement procedures. Link admitted she was a "building official," whose authority included interpreting the Uniform Building Code (UBC) and overseeing its enforcement and the issuance of building and repair permits. UBC § § 202(a) ("The building official is hereby authorized and directed to enforce all provisions of this code [and] ... shall have the power to render interpretation of this code and to adopt and enforce rules and supplemental regulations in order to clarify the application of its provisions. Such interpretations, rules and regulations shall be in

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[8] Yetiv and AAC do not argue that, or brief whether, Link was a final policymaker for purposes of authorizing searches of the AAC apartments. Neither do they indicate on what materials the trial judge could have relied for such a determination.

conformance with the intent and purpose of this code."), 303(a) (permit issuance) (Ord. No. 93-554, 5-12-93); CURB § 10-321 (Ord. No. 94-674, § 15, 7-6-94). Upon discovering a CURB violation, a building official, such as Link, can issue a municipal court citation, enforceable in municipal court, or request a hearing before a hearing official or the BSC. CURB § 10-346, 10-347 (Ord. No. 94-674, § 15, 7-6-94). Both the hearing official's and BSC's decisions are final unless the property owner seeks rehearing or appeals to district court. CURB § § 10-371, 10-394 (Ord. No. 93- 1570, § 1, 12-8-93); Procedural Rules of the Building and Standards Commission of the City of Houston, § 3.07, 2-23-94; *see* Tex. Loc. Gov't Code Ann. § 54.039 (Vernon Supp.1999). State law provides that "the governing body of the municipality"--here, City Council--may establish a BSC. Tex. Loc. Gov't Code Ann. § 54.033 (Vernon Supp.1999). If the owner fails to comply with the hearing officer's or BSC's order, the building official must enforce the order. CURB § 10-370 (Ord. No. 93-1570, § 1, 12-8-93; Ord. No. 94-674, § 15, 7-6-94).

Link testified her decisions were subject to the review of the Director of Public Works, whose decisions, in turn, were subject to the mayor's review. Moreover, a building official's decisions--including, the City claims and Yetiv and AAC do not deny, denying repair permits--are subject to review of the City's General Board of Appeals (GBA), whose duties include interpreting the UBC, reporting to the mayor and City Council on its actions, and recommending UBC amendments. UBC § § 204(b) (Ord. No. 93-554, 5-12-93). Finally, the GBA's decisions are not final; they can be appealed to City Council. UBC § 204(c) (Ord. No. 93-554, 5-12-93).

***9** The above ordinances and statutes contemplate at least City Council as the final policymaker in these

two areas, but not building official Link, who only carried out those policies. The fact that a policymaking official has discretion in exercising her functions does not, without more, make her a *final* policymaking official. *Pembaur*, 475 U.S. at 481-83, 106 S Ct. at 1299-1300 (holding that the County Prosecutor, *i.e.*, the District Attorney, was the final policymaker for law-enforcement matters under following test: "The fact that a particular official--even a policymaking official--has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final governmental policy respecting such activity before the municipality can be held liable."). Link did not have policymaking power similar to the County Prosecutor or the County Sheriff in *Pembaur*. Link clearly exercised discretion, but, because her decisions were constrained by her superiors' policies, those policies, rather than Link's discretion in performing them, were the City's acts. *See Praprotnik*, 485 U.S. at 127, 108 S.Ct. at 926 (rejecting argument that plaintiff's supervisors, who fired him, were final policymakers simply because the commission reviewing their decision had only limited review; also holding, "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality.").

Yetiv claims that CURB section 10-370, entitled "Action by city authorized," demonstrates Link is a final policymaker because it requires the building official to enforce the hearing officer's or BSC's orderif the party does not comply. CURB § 10-370 (Ord. No. 93-1570, § 1, 12-8-93; Ord. No. 94-674, § 15, 7-6-94). In fact, the section gives a building official like Link *no* discretion, much less policymaking authority,

to refuse to enforce a DBO. *Id.* ("[T]he building official *shall* cause the building to be vacated, repaired, secured, and/or demolished pursuant to the order.") (emphasis added). Furthermore, the term "building official" is used widely through CURB and the UBC to refer to a number of people performing a host of functions that do not involve the making of policy, such as obtaining warrants for and conducting inspections, issuing stop-work notices for code violations, making valuations for fee assessments, refunding erroneously collected fees, posting notice of certain hearings and orders, assisting residents vacating buildings, and the like. *See, e.g.*, UBC § § 202(c), 202(d), 304(c), 304(f), 305(a) (Ord. No. 93- 554, May 12, 1993); CURB § § 10-321, 10-322, 10-335, 10-349 (Ord. No. 93-1570, § 1, 12-8-93; Ord. No. 94-674, § § 11, 12, 14, 17, 7-6-94). If the term "building official" always signified a final policymaker's actions, the City could be liable for actions clearly not involving policymaking at all.

***10** Similarly, because Link's decisions in the complained-of area were subject to the review of the City's authorized policymakers, Link could not be a final policymaker in that area. *See* Praprotnik, 485 U.S. at 127, 108 S.Ct. at 926 ("[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for performance with *their* policies.") (emphasis in original). In response, Yetiv and AAC rely on the following documents to show there was no *effective* review of Link's actions:

. Link's August 22, 1994 letter telling Yetiv that appeal of "the City's" decisions regarding AAC's progress or default in repairing its apartments under the DBO was to "district court," but also explaining the timelines for the DBO's "appeal" to the BSC had Yetiv done so timely;

. Yetiv's September 6, 1994 letter to Huey, stating that (1) the best course of action against Link was to seek another BSC hearing; (2) he had left one message with a BSC representative,[9] who did not return his call; (3) Link had told Yetiv he could not have a BSC hearing, which contradicted what other city employees told him; and (4) Yetiv was considering requesting a BSC rehearing;

. Yetiv received no reply to this letter or another to Huey, in which he asked how to get a BSC hearing;

. The text of Yetiv's October 11, 1994 presentation to City Council, described above.

First, if Link misstated the appellate process, that does not change the fact that the above ordinances provide for BSC rehearing or appeal to the GBA.[10] Second, whether Huey or Link responded to Yetiv's queries on BSC procedure, or whether Yetiv sought a BSC rehearing more than by his leaving a sole phone message, does not affect whether Link was a final

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[9] Yetiv and AAC's brief states that Yetiv later learned the BSC representative, Kathy Morgan, worked for Link, but the document cited in support does not say this. Later in their brief, Yetiv and AAC repeat this claim and also say Link "precluded Yetiv from getting a BSC hearing"; however, the record cited in support does not say this.

[10] Moreover, even if Link were delegated the final decision in permit issuance, inspection, or demolition matters, that would not necessarily transform her into a policymaker (much less a final policymaker) in those matters. *See* *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1246 (5th Cir.1993) (opinion on remand from Supreme Court, supra) (holding that official was not final policymaker under statute's terms, despite his having final decision in the particular area). That is, the fact that one's decisions in an area are reviewable by policymakers necessarily means one is not a final policymaker in that area, but the fact that one's decisions are final does not necessarily make one a final policymaker.

policymaker, which is determined by reviewing law and custom amounting to law.[11] *See* Jett, 491 U.S. at 738, 109 S.Ct. at 2724; *Praprotnik*, 485 U.S. at 124, 108 S.Ct. at 924. Finally, City Council's not investigating Link's discretionary decisions after Yetiv's presentation was not a delegation to Link of policymaking authority. *See Praprotnik*, 485 U.S. at 130, 108 S.Ct. at 927-28 ("Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy.").

We distinguish *Houston v. De Trapani*,[12] on which Yetiv and AAC rely. The *De Trapani* court took a less restrictive view of who a final policymaker could be because a "takings" claim was asserted:

> The preponderance of § 1983 problems arise in contexts other than the takings arena.... Indeed, the specter of respondeat superior from which the judiciary has recoiled is purely a tort law concept, traditionally confined to disputes between private parties. *Governmental* takings are, of course, entirely different by definition. This conclusion is bolstered by the [U.S. Supreme] Court's comment in *Daniels* that the parameters of § 1983 may depend on the right implicated.... Accordingly, we are disinclined to give § 1983 the restrictive reading which the city advocates on the basis of cases outside the arena of takings.

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[11] Moreover, Yetiv admitted he (1) knew a BSC rehearing was a way to challenge a DBO and (2) only once left a message about a BSC rehearing for the BSC secretary, although he saw the BSC secretary after that and never asked her for a BSC rehearing or requested one in writing. Although he sent BSC queries to Link, Yetiv knew Link was not a BSC panel member.

[12] 771 S.W.2d 703 (Tex.App.--Houston [14th Dist.] 1989, writ denied).

***11** *Id.* at 707 (emphasis in original). Rather, we find the following cases persuasive: *City of Lubbock v. Corbin,*[13] *City of Houston v. Leach,*[14] *Bennett v. City of Slidell,*[15] and *Carr v. Town of Dewey Beach.*[16]

We hold the evidence on which Yetiv and AAC rely is no evidence Link was a final policymaker on demolition or permit decisions for whose actions the City could be liable. Therefore, we hold the trial judge erred in determining that, as a matter of law, Link was a final policymaker and in submitting those portions of jury questions two and three allowing a finding of City liability based on Link's actions.

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[13] 942 S.W.2d 14, 20-21 (Tex.App.--Amarillo 1996, writ denied) (holding supervisor/inspector of building code department not final policymaker for decisions relating to home's construction because his decisions appealable to building board of appeals).

[14] 819 S.W.2d 185, 199-200 (Tex.App.--Houston [14th Dist.] 1991, no writ) (holding director of solid waste management not final policymaker for laying off whistleblower, despite director's ability to choose which job classification to lay off, when city department reviewed decision; employee had right to appeal to city commission, even though commission had deferential review only; and city charter and code vested employment authority in those other than director).

[15] 728 F.2d 762, 769-70 (5th Cir.1984) (holding building inspector not final policymaker for refusing to issue compliance certificate, despite having discretion, when he executed policy established by code, had authority from city's chief administrative officer, and his decisions were appealable).

[16] 730 F.Supp. 591, 605-08 (D.Del.1990) (building inspector).

4. Did Yetiv and AAC Show an Unconstitutional Pattern or Custom of City Employees for Which the City Can be Liable?

The City next argues there was no or insufficient evidence of a persistent, widespread, permanent, and well-settled pattern or custom of denying permits or demolishing or illegally searching low-income housing for which the City could be liable.

In response, Yetiv and AAC claim there were widespread customs of permit withholding, low-income-housing demolition, and illegal searches of Houston residents' buildings. They rely on the same evidence on which they relied to show a City Council policy decision (section A, 2 above). However, this is evidence at most of a sealed settlement, Huey's interest in dangerous buildings, neighbors' (not city employees') wish to demolish the AAC apartments, and Yetiv's complaints to Council of Link's harassment of him and AAC. Moreover, the only other evidence Yetiv and AAC discuss on appeal does not show a widespread and well-settled pattern of denying permits or demolishing or illegally searching low-income housing:

. The Leaths, whose settlement with the City was sealed, testified their property had a DBO and was in disrepair; they wished to convert the property to a seniors assisted-living complex (*i.e.*, not necessarily low-income housing like AAC's); Huey increased inspections; the Leaths understood their work permits were revoked at Huey's insistence, but they did not know why; Huey told them she did not want their apartments renovated; and the building was demolished, but after the Leaths consented.

. Perry Kay testified he demolished his rental house after the City ordered him to demolish, repair, or secure it within 30 days and he could not obtain funding for repairs in time. Kay admitted the

property needed some repairs, but he had not been able to get funding for repairs for five years or to have the building renovated for 10 years. Kay did not submit any written cure plans (though he told the hearing officer he wanted to build a daycare center), seek a BSC rehearing, apply for building permits, or detail the repairs he intended to do before or after the BSC hearing. Kay did not testify that this was low- income rental property.

***12** . Tony Frapps testified he owns between 500 and 600 single-family, low-to-moderate-income rental homes. Frapps stated only that DBOs have been issued on some of his houses and he has "had some contacts" and "problems" with Neighborhood Protection Division, but he did not specify what or why. He has had no problems getting permits.

Kay did not testify that his property was low-income, that he was denied permits, or that anyone illegally searched his property. Frapps's testimony of some "contacts" and "problems" with the Neighborhood Protection Division does not show any of the alleged customs, and Frapps testified he had no problems getting permits.

Therefore, the only evidence of any custom or usage of demolishing or searching low-income housing or withholding permits involves the AAC apartments and the Leaths's buildings. These limited incidents involving only two parties, although known to Council, do not make a persistent, widespread, permanent, and well-settled custom for which the City can be liable. *See* Hamilton v. Rodgers, 791 F.2d 439, 443 (5th Cir.1986) (holding no well-settled, widespread custom existed when about 12 racial-harassment incidents occurred over two and one-half years and high-ranking officials learned of occasional incidents). *Compare* Webster v. City of Houston, 689 F.2d 1220, 1227 (5th Cir.1982) (holding custom for which city

could be liable existed when 75 to 80 percent of police officers carried "throw-down" weapons and police department covered up use of throw-down weapon in the shooting of the plaintiffs' family member), *vacated on other grounds,* 735 F.2d 838, 842 (5th Cir.1984) (en banc), *aff'd in part on pertinent grounds and rev'd in part on other grounds,* 739 F.2d 993, 994 (5th Cir.1984) (en banc rehearing).

We hold the evidence on which Yetiv and AAC rely is no evidence of a persistent, widespread, permanent, and well-settled custom or usage to demolish or illegally search low-income housing or withhold building permits from Houston residents. Therefore, we hold the trial judge erred in submitting that portion of jury questions two and three allowing a finding of City liability based on custom or usage.

5. Conclusion

We sustain the City's issues one through three. Having found no evidence supporting the City's liability for any employee's actions, we do not reach the City's issues four and five (whether the due process claims were ripe or correct). Having found no evidence supporting jury findings two and three, we render judgment that AAC take nothing on its section 1983 claims against the City. Therefore, we need not reach the City's issues six and seven, dealing with the measure of and evidence supporting actual damages. We further hold the trial judge erred in enjoining the City's inspections of the AAC apartments based upon the jury's finding of section 1983 liability, and we render judgment dissolving the injunction.

B. Constitutionality of Various CURB Provisions

1. Procedural Background

***13** In May 1997, Yetiv and AAC moved for partial summary judgment, seeking, among other things, a declaration that CURB sections 10-361(a)(3, 5, 6, 7, 8, 10) and 10-361(b)(1, 2) were unconstitutionally vague on their face and as applied to them and an injunction preventing their enforcement.[17] The trial judge granted the motion, ruled the following CURB provisions were unconstitutionally vague, and enjoined the City from enforcing them:

> **Sec. 10-361. Dangerous buildings defined.**
> (a) All buildings, structures, dwellings, dwelling units, and accessory buildings, regardless of the date of their construction, that have any or all of the following defects are deemed to be dilapidated, substandard or unfit for human habitation and a danger to the public health, safety and welfare, and are further declared to be dangerous buildings:
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> * * *
>
> (3) Roofs or walls that are not *weathertight* and *waterproof; ...*
> (5) *Parts* that are not *properly* attached so that they *may* fall or injure members of the public or property;
> (6) *Light, air or sanitation facilities* that are inadequate to protect the life, safety or the general health and welfare of the structure's occupants or inhabitants of the city;

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[17] Although the motion for partial summary judgment was styled as Yetiv's, we find he brought it for himself, in his individual capacity, and for AAC, in his representative capacity, for the reasons stated in Section A of the portion of this opinion treating Yetiv and AAC's appeal, below.

(7) *Unsafe or defective* electrical wiring, devices or *equipment,* or *unsafe or defective* gas piping or *appliances* that are liable to cause or promote fires;
(8) Damage by fire, explosion, wind, vandalism, the elements of nature or otherwise so as to be *dangerous* to the life, safety or the general health and welfare of the structure's occupants or inhabitants of the city; ...
(10) Conditions that violate any provision of this Code, the Building Code or the city fire Code to such an extent as to be a *danger* to the public health, safety, and welfare; ...
(b) A building that is boarded up, fenced or otherwise secured in any manner is nevertheless declared to be a dangerous building under the foregoing criteria if:
(1) The building constitutes a *danger* to the public even though secured from entry;
(2) The building's roof, walls or floor contains *holes* that *would* allow insects, ectoparasites, rodents or other pests to gain access to the building for harborage to the extent constituting a present hazard to health or safety;....

CURB § 10-361(a)(3, 5, 6, 7, 8, 10), (b)(1, 2) (Ord. No. 93-1570, § 1, 12-8- 93) (emphasis indicates terms Yetiv and AAC claimed were vague).

2. Do Yetiv and AAC Have Standing to Make an As-Applied Vagueness Challenge to these CURB Provisions?

In issue eight, the City argues for the first time on appeal that Yetiv and AAC do not have standing to assert that the CURB provisions were unconstitutionally vague as applied to them because their DBO and municipal court citations were issued under CURB's predecessor, not under CURB.

Yetiv and AAC initially respond that the City did not preserve its challenge to their standing, but standing is a component of subject-matter jurisdiction and may be raised for the first time on appeal. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex.1993). Yetiv and AAC also claim that we may consider only summary judgment evidence, but we may review the whole record. *Id.* at 446.

***14** It was Yetiv and AAC's burden to show the complained-of CURB provisions were unconstitutionally applied to them. *See Vuong v. State*, 830 S.W.2d 929, 941 (Tex.Crim.App.1992) (before court addresses unconstitutionality issues on appeal, appellant must first show vague law unconstitutionally applied to him).

Yetiv and AAC first point to the sole DBO issued for the AAC apartments as evidence CURB was unconstitutionally applied to them. However, this DBO was not issued under CURB. It was issued under former ordinance 10-326(e)(1)-(5), (7)- (10). CURB was not adopted until December 12, 1993, after the DBO was issued on November 3, 1993. The DBO states the buildings were "deteriorated, open, vacant and accessible," in violation of former City Code sections 10-326(e)(1)-(5), (7)-(10); "dilapidated, substandard or unfit for human habitation"; "constitute [d] a hazard to the health, safety or welfare of the occupant and/or the citizens"; and "dangerous buildings within the terms of [former] Section 10-326 of the City of Houston's Code of Ordinances." However, the DBO does not state the buildings were found to be "dangerous buildings" for the reasons provided in the challenged section of the present ordinance.[18]

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[18] For example, the DBO does not state the buildings were dangerous because of walls that were not "weathertight" or "weatherproof," for "parts" that were not "properly attached," for "unsafe or defective" wiring, for

Yetiv and AAC next rely on the following facts occurring in 1994, after CURB's effective date: (1) city inspectors issued 23 citations to Yetiv at once, but these were not for violations of the challenged CURB provisions above; instead, they were for building without permits and for not timely carrying out the "expired" DBO's requirements of getting permits and making repairs; (2) the inspectors never showed up for the hearing on these 23 citations; (3) city inspectors issued Yetiv a violation notice for having a shopping cart on his property; and (4) three city inspectors could not define some of the complained-of CURB terms in the abstract. These facts are not relevant to whether *the challenged CURB provisions* were unconstitutionally applied to AAC or Yetiv, *i.e.*, the indicated evidence does not show the citations were levied for violations of the complained-of provisions or upon application of the complained-of terms. We have reviewed Yetiv's entire trial testimony, and he did not testify that he was cited or received another DBO for violations of the complained-of CURB provisions or upon application of the complained-of CURB terms. Neither did he testify that anyone told him that he would be issued CURB citations or DBOs in the future. At most, Yetiv in general terms testified he disagreed with the "expired" DBO's determination that some of his buildings were dangerous.

However, our own review of the record reveals an August 10, 1994 letter (post- CURB's effective date of December 12, 1993) from Link to Yetiv, recounting five violations at the AAC apartments ("unsecured buildings; evidence of rodent infestation; roach infestation; uncapped sewer; exposed electrical wiring") and stating citations would issue if the

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"holes" through which rodents could enter, or for any other defects defined as they were in the challenged CURB provisions.

violations were not fixed.[19] The alleged violations must have been violations of CURB, as they were discovered after CURB's effective date. Of these five violations, the four that concern the challenged CURB terms were "exposed electrical wiring" (§ 10-361(a)(7)), "evidence of rodent infestation" and "roach infestation" (§ 10-361(b)(2)), and "uncapped sewer" (§ 10-361(a)(6)).

***15** Yetiv and AAC did not show they were penalized under any of the complained-of CURB provisions except the four relevant ones mentioned in Link's August 10, 1994 letter. Therefore, we hold they had no standing to challenge any but those four terms for as-applied vagueness. *See* Johnson v. State, 853 S.W.2d 527, 534 (Tex.Crim.App.1992) (holding defendant could not challenge for vagueness language contained in statute that was inapplicable to him); *cf.* Oil Well Drilling Co. v. Associated Indem. Corp., 153 Tex. 153, 264 S.W.2d 697, 699-700 (Tex.1954) (holding party could not complain that statute was unconstitutionally discriminatory for allowing insurer discretion not to issue policy under certain plan when party was issued policy under that plan).

3. The Merits of Yetiv and AAC's As-Applied Vagueness Challenge

We next examine whether the four challenged CURB provisions that Link's August 10, 1994 letter alleged Yetiv and AAC violated were unconstitutionally vague as applied. The void-for-vagueness doctrine requires that a penal statute[20] define the offense with sufficient

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[19] The letter was attached to Yetiv and AAC's response to Huey's and Link's summary judgment motions.

[20] The City conceded that CURB is penal because it provides misdemeanor penalties for violations. *See* CURB § 10-320 (Ord. No. 93-1570, § 1, 12-8-93; Ord. No. 95-228, § 5, 3-1-95).

definiteness that an ordinary person can understand what conduct is prohibited and so that the statute will not be enforced arbitrarily and discriminatorily. *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). If a law clearly applies to an individual's conduct under any construction of that law, then that law cannot be unconstitutionally vague as applied to his conduct. *See Vuong*, 830 S.W.2d at 941.

No one disputes that, when the DBO was issued on November 3, 1993, some of the condemned AAC apartment buildings had caved-in roofs that exposed the interior to the elements and contained fallen structural materials. Additionally, the four relevant CURB violations mentioned in Link's August 10, 1994 letter would clearly have fallen under the challenged terms. For example, "exposed electrical wiring" (the alleged violation) is obviously "unsafe or defective electrical wiring" (the relevant term of section 10-361(a)(7)). An "uncapped sewer" (the alleged violation) easily constitutes an inadequate "sanitation facilit[y]" (the relevant term of section 10-361(a)(6)). Finally, caved-in roofs would have been sufficiently-sized "holes that would allow insects" to gain access (the relevant part of section 10-361(b)(2)) and to leave "evidence of rodent infestation" and "roach infestation"(the alleged violations).

Accordingly, Yetiv and AAC's as-applied vagueness challenge fails because, under any construction of the CURB ordinance, these buildings and violations would have fallen within its terms. *See Cain v. State*, 855 S.W.2d 714, 718 (Tex.Crim.App.1993) (holding as-applied vagueness challenge failed because defendant's conduct clearly violated nepotism statute); *Vuong*, 830 S.W.2d at 941. Therefore, summary judgment was improper on this ground.

4. The Merits of Yetiv and AAC's Facial Vagueness Challenge

***16** Yetiv and AAC's partial summary judgment motion alternatively argued that the challenged CURB provisions were unconstitutionally vague on their face. We will uphold Yetiv and AAC's facial vagueness challenge only if the challenged CURB provisions are impermissibly vague in all their applications. *E.g.*, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). That is, Yetiv and AAC must establish that the challenged CURB provisions always operate unconstitutionally. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 627 (Tex.1996).[21] Yetiv and AAC's facial vagueness challenge fails if they "engage[d] in some conduct that is clearly proscribed." *Flipside*, 455 U.S. at 495 and n. 7; 102 S.Ct. at 1191 and n. 7 (considering facial vagueness challenge and reasoning, " 'One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.' The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' ") (citations omitted).

The same evidence discussed above for the as-applied vagueness challenge defeats the facial one, as some of the AAC apartment buildings clearly fell within the

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[21] Therefore, Yetiv and AAC's evidence showing that some city inspectors could not define some of the complained-of CURB terms in the abstract could not, without more, carry their burden of showing that the terms were unconstitutionally vague on their face.

challenged CURB terms.[22] *See* *id.*, 455 U.S. at 501-03, 102 S.Ct. at 1195-96 (overruling challenge that terms "designed for ... use" and "marketed for use" were facially vague, when some but not all of plaintiff's products clearly fell within those terms). Therefore, summary judgment was improper on this ground.

5. Conclusion

We hold Yetiv and AAC did not have standing to challenge the constitutionality of CURB sections 10-361(a)(3, 5, 8, 10) and 10-361(b)(1) for as-applied vagueness. We further hold that Yetiv and AAC's as-applied vagueness challenge to the remaining CURB sections, and their facial vagueness challenge to all of the CURB sections, failed as a matter of law.

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[22] For example, a caved-in roof is clearly not "weathertight and waterproof," which CURB defines as "made or assembled so that water cannot enter or escape" and "able to withstand exposure to weather without damage." CURB § 10-317 (Ord. No. 93-1570, § 1, 12-8-93; Ord. No. 94-674, § 10, 7-6-94). The dangling boards and caved-in roofing materials were "parts ... not properly attached ... so that they may fall or injure ..." under any definition of the terms. If a building is caved in and open to the elements, its "light, air, and sanitation facilities ... are inadequate to protect ... life, safety or ... health and welfare...." Exposed wiring is obviously "unsafe or defective electrical wiring ... devices or equipment ... liable to cause or promote fires." A water-damaged roof that has collapsed is "damage[d] ... by the elements of nature ... so as to be dangerous...." Moreover, "danger" is generally understood as exposure or liability to injury, pain, or loss, a definition that some of the dilapidated AAC apartment buildings clearly fit. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 285 (8th ed.1981). Finally, there had to be sufficiently sized "holes that would allow insects [or] rodents" to gain access for there to be "evidence of rodent infestation" and "roach infestation," and a building with a caved-in roof obviously has sufficiently large "holes."

Therefore, we hold the trial judge erred in granting summary judgment for Yetiv and AAC, declaring those CURB provisions unconstitutional for vagueness, and enjoining the City's enforcement of those provisions. We sustain issue eight.

C. Attorney's Fees

In issue 10, the City challenges the award of attorney's fees on various grounds.

The jury found against Yetiv on his section 1983 claim against the City, and we have held AAC's section 1983 claims against the City for illegal searches and denial of permits fail. Because AAC and Yetiv did not prevail on any of their section 1983 claims against the City, they may not recover attorney's fees on those claims. 42 U.S.C. § 1988 (1999) (relevant portion not substantively changed by 1996 amendment). Therefore, we reverse that portion of the judgment awarding AAC attorney's fees against the City on its section 1983 claims.

***17** However, the award of attorney's fees in declaratory judgment actions, such as that used here to challenge CURB, is discretionary and is not dependant on whether a party prevailed. *ANR Prod. Co. v. American Guar. & Liab. Ins. Co.*, 981 S.W.2d 889, 892 (Tex.App.--Houston [1st Dist.] 1998, no pet.); *see also Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637-38 (Tex.1996). Therefore, we must reverse the attorney's fees awarded under the declaratory judgment statute and remand for the trial judge to consider and exercise his discretion on the amount of attorney's fees, if any, to be awarded under that statute. *Id.* Because we must remand on this issue, we do not consider the City's issue 10. Because we have reversed the judgment against the City and remanded on other

issues, we also reverse the assessment of costs in the court below against the City and remand for further consideration of that issue.

YETIV AND AAC'S APPEAL

In a separate appeal, Yetiv and AAC complain of the 166a(c) summary judgments rendered for Huey and Link. We follow the usual standard of review. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex.1997).

A. AAC's Appellate Challenge

We must first address Huey's contention that, because AAC did not respond to her summary judgment below, AAC is limited on appeal to arguing only that her summary judgment grounds were legally insufficient. *See* *Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979).

The procedural history is important. On October 2, 1996, the trial judge dismissed AAC's counterclaim because AAC was not in good corporate standing. On October 17, 1996, Yetiv filed an amended counterclaim, naming AAC as a co- plaintiff and stating, "AAC's ... causes of action are hereby pursued by its sole shareholder, Jack Yetiv." Huey and Link moved for summary judgment against "Yetiv" on May 16, 1997, while AAC was incapacitated. Yetiv filed a summary judgment response on May 30, 1997. On June 17, 1997, AAC filed its first amended counterclaim, claiming good standing as of June 10, 1997. Huey and Link did not amend their summary judgment motions to include AAC. On June 20, 1997, the trial judge granted partial summary judgments in Huey and Link's favor against both AAC and Yetiv.

AAC has never attacked the summary judgments on the ground Huey and Link did not move for summary judgment against it.[23] Rather, relying on *El T. Mexican Restaurants, Inc. v. Bacon*,[24] AAC argues that Yetiv was acting on its behalf when he filed the summary judgment answer. We agree.

The October 17th first amended petition (1) named Yetiv and AAC as plaintiffs, (2) recited that Yetiv was "pursuing" AAC's causes of action, and (3) asserted some claims belonging to Yetiv individually and others belonging only to AAC. This is tantamount to Yetiv's bringing AAC's claims in a representative capacity, not an individual one. When AAC forfeited its privilege to sue, it retained legal title to its claims, but beneficial title vested in Yetiv as its sole shareholder; therefore, he could sue as AAC's representative. *Bacon*, 921 S.W.2d at 251.

***18** Because Yetiv sued both individually and representatively for AAC, he necessarily answered the summary judgments in both capacities.[25] Therefore, it is as if AAC answered. AAC may thus raise any challenge preserved in Yetiv's summary judgment response.

We overrule Huey's first argument.

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[23] *See* *Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex.1983) (summary judgment may not be rendered on claim not attacked in motion); *Toonen v. United Servs. Auto. Ass'n*, 935 S.W.2d 937, 942 (Tex.App.--Texarkana 1996, no writ) (error in granting too broad a summary judgment is waived if not attacked on appeal).

[24] 921 S.W.2d 247 (Tex.App.--Houston [1st Dist.] 1995, writ denied).

[25] Accordingly, we refer herein to the summary judgment motions as being against both Yetiv and AAC.

B. Summary Judgment For Huey

Huey moved for a 166a(c) summary judgment[26] against Yetiv and AAC's section 1983 claims and claims for tortious interference with contract and state-constitutional violations on the grounds that (1) she enjoyed official and qualified immunity; (2) she enjoyed an absolute privilege while carrying out her Council duties; (3) she did not violate their rights; (4) Yetiv and AAC produced no evidence that she kept them from contracting, that she acted maliciously, or that she was not privileged or justified; and (5) the City Charter gave her the right to respond to citizen complaints.[27] The trial judge rendered summary judgment for Huey on "all issues and all parties."

1. Official Immunity

Huey moved for summary judgment on Yetiv and AAC's state-law claims on the ground that she enjoyed official immunity. Huey is entitled to official immunity from suit for state-law claims arising out of her performance of (1) discretionary duties (2) in good faith and (3) within the scope of her authority.

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[26] Huey's motion phrased many of her summary judgment grounds in terms of Yetiv's producing "no evidence" to support his claims, but it was not a no-evidence motion (civil procedure rule 166a(i)) because it was filed before the civil procedure rules allowed no-evidence motions, Huey relied on her own summary judgment evidence below, and she analyzes the motion as a rule-166a(c) motion on appeal.

[27] Huey's summary judgment motion also attacked Yetiv and AAC's malicious prosecution and abuse of process claims and their prayer for mental anguish damages. However, by the time summary judgment was granted, Yetiv and AAC no longer sought these damages, AAC's counterclaim had dropped these claims, and Yetiv admits that he had abandoned those same claims.

Wadewitz v. Montgomery, 951 S.W.2d 464, 466 (Tex.1997). It was Huey's burden to show these three elements conclusively. *Id.*

Yetiv and AAC have never disputed that Huey's acts were discretionary. Rather, they argue they were not in Huey's scope of authority or done in good faith. We examine Huey's good faith first.

We agree that fact issues exist whether Huey acted in good faith. An official acts in good faith if a reasonably prudent official could have believed her conduct was lawful in light of clearly established law and the information known at the time. *Thomas v. Collins*, 960 S.W.2d 106, 113 (Tex.App.-- Houston [1st Dist.] 1997, pet. denied). Only if Huey carried her burden did Yetiv and AAC then have to show no person in Huey's position could reasonably have believed the facts justified her acts. *Id.*

Huey relied on her own affidavit and that of former Council member Alfred J. Calloway. The statements in paragraphs five, nine, 11, 12, and 16 of Huey's affidavit and most paragraphs in Calloway's affidavit--which stated that Huey acted in good faith, without malice or intent to harass, and reasonably--are conclusory or do not set out the detailed, factual analysis the Supreme Court requires to show objective good faith. *See Wadewitz*, 951 S.W.2d at 466-47 (holding expert's conclusory statement that reasonable officer could have taken some action did not establish good faith, when it did not address what reasonable officer could have believed and did not contain factual assessment of need for action versus the action's risk); *see also Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex.App.--Houston [1st Dist.] 1997, no pet.) (holding summary judgment evidence incompetent if conclusory and without underlying facts in support). *Compare Bates v. Texas State Technical College*, 983

S.W.2d 821, 832-33 (Tex.App.--Waco 1998, pet. denied) (affidavits, detailing precise bases for decisions and including specific and readily controvertible facts, carried movants' "good faith" burden).

***19** Moreover, Yetiv and AAC's summary judgment proof,[28] which we must take as true, contradicted Huey's version of virtually every nonconclusory fact asserted in her summary judgment evidence:

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[28] Some of the proof that Yetiv and AAC's brief cites was attached to their petition and not made part, by reference or by attachment, of their summary judgment proof. Therefore, we do not consider it here. *See, e.g.*, Boeker v. Syptak, 916 S.W.2d 59, 61-62 (Tex.App.--Houston [1st Dist.] 1996, no writ) (affidavits attached to pleadings, but not to summary judgment motion, are generally not summary judgment evidence).

Huey's Version	Yetiv and AAC's Version
1. Huey did not authorize anyone to survey or videotape the AAC apartments.	Two neighbors told Yetiv that Huey had them videotape the AAC apartments repeatedly, including after Yetiv had complained to City Council and on television.
2. The neighbors denied that Huey instricted [*sic*] them to videotape the AAC apartments.	
1. Huey never directed Link or those in Link's department.	1. Huey and her assistant assured Yetiv that Link would not shut down the AAC apartments because Link did what Huey wanted. Link then withheld permits from AAC.
2. Huey never told Yetiv that she controlled Link's actions, because this was untrue, and such control would violiate [*sic*] the law.	2. Link's department's own records regarding another property (not Yetiv's) in Huey's district contained the notation, "JHC OR CMHH APPROVAL REQUIRED FOR PERMITS" and "NO PMTS WO CMHH OR JHC APPROVAL," which Yetiv interprets as no permits issued without Council member Helen Huey's approval.

3. Huey never instructed anyone not to issue permits to AAC.	3. Two neighbors told Yetiv Huey had promised them the AAC apartments would be demolished.
4. Two of Link's employees denied receiving direct instructions from Huey, one denied being order to write tickets, and another denied discussing AAC's case with Huey. Link denied getting orders from Huey.	
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1. Huey never participated in inspections of Yetiv's properties.	1. Shortly after Yetiv's presentation to Council and television appearance, while a police officer was investigating a complaint at the AAC apartments, the officer asked twice whether Yetiv "had a beef with some Council woman named 'Huey'."
2. Huey never directed anyone to issue citations concerning Yetiv's properties.	2. Huey's office made a "general CURB ordinance complaint" (i.e., one to look for any CURB violations, not one based on specific complaints) to Link's office on December 4,

	1996 for another of Yetiv's properties. The responding investigator could not recall having ever before received a private citizen's complaint that was so general, and he had not noticed any such problems during four inspections in the last two months. Yetiv and AAC infer the complaint was invented, not genuine.
3. The complaint that Huey sent to Link's office on December 4, 1996 was one received from a constituent, not one invented by Huey's office.	
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1. Huey based her City Council statement on Link's status report, with which she found nothing wrong.	1. Huey's Council statement said "No action was taken by Mr. Yetiv to comply with the [DBO]" and that he did not submit a cure plan or request an extension before the DBO "expired"; however, he requested an extension and submitted a curse plan to Link—as Link's own chronology attached to Huey's

	Council statement confirmed--and he so informed Huey.
2. Huey made the statement merely to respond to Yetiv's public accusations.	2. Huey stated that, "Mr. Yetiv has refused to complete an application for an inspection or to apply for repair permits." However, Yetiv had told Huey in three letters that (i) Link could not decide whether an inspection should precede or follow his posting a cash bond, (ii) he had contacted an inspector, but the inspector could not proceed because of a "hold" that Link did not lift despite earlier having promised Huey and Yetiv she would do so, and (iii) he had tried to get permits. Yetiv also informed Huey by letter that Link's claim that he had not submitted a cure plan was untrue.
	3. Huey stated that Yetiv's cash bond was received on August 23, 1994, but Yetiv had already informed Huey that the bond had been received a day earlier.

1. Huey simply forwarded any complaints she received concerning the AAC apartments to Link's department pursuant to Huey's custom.	After promising two constituents that AAC would be demolished, and after Yetiv's criticism in Council and on television, Huey's office called in an unusually "general" CURB complaint (i.e., one to look for any CURB violations, not one based on specific complaints), she had neighbors videotape the AAC apartments, and an officer sent to investigate the AAC apartments asked Yetiv whether he had a "beef" with Huey.
2. Any Council member may refer priority citizen complaints to Link's office, and others did it as often as Huey did.	

Huey did not harass Yetiv.	(See above evidence Yetiv and AAC submitted).

Therefore, a material dispute exists whether the facts on which Huey relied to show good faith were accurate, and summary judgment was improper. *See* City of Dallas v. Aguirre, 977 S.W.2d 862, 864 (Tex.App.--Dallas 1998, no pet.).[29] Moreover, taking Yetiv and AAC's proof as true, no reasonable City Council member could have believed that (1) knowingly reading inaccurate statements to City Council and (2) controlling Link's department's actions were justified or in good faith.

We sustain Yetiv and AAC's challenge and hold that summary judgment could not have been granted on their state-law claims against Huey on the ground that she enjoyed official immunity.

2. "Absolute Privilege" While Performing Council Duties

Huey moved for summary judgment against all Yetiv and AAC's claims on the ground that she enjoyed an absolute privilege while acting within the scope of her Council responsibilities. However, viewed in the required light, Yetiv's evidence indicated Huey knowingly misstated the facts of AAC's case to Council and controlled Link's actions, the second of which Huey's own affidavit admitted would be illegal. Assuming without deciding that such an absolute privilege could exist for actions in the scope of Council

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[29] *Accord* Dalrymple v. University of Texas Sys., 949 S.W.2d 395, 402 (Tex.App.--Austin 1997) (holding nonmovant seeking to defeat good- faith summary judgment must show no reasonable official in same position could have thought *the nonmovant's version of facts* justified the action), *rev'd in part on other grounds*, 42 Tex. Sup.Ct. J. 815 (Tex. June 24, 1999); City of San Antonio v. Garcia, 974 S.W.2d 756, 758-59 (Tex.App.--San Antonio 1998, no pet.); Martinez v. Mikel, 960 S.W.2d 158, 160-61 (Tex.App.--San Antonio 1997, no pet.).

duties, we hold that a fact issue exists whether Huey acted within that scope. Accordingly, we sustain Yetiv and AAC's challenge and hold that summary judgment could not have been granted for Huey based on this alleged privilege.

3. Claims for Violations of the State Constitution

Because the defenses of official immunity and "absolute Council privilege," which we have held are not meritorious, were Huey's only summary judgment grounds attacking Yetiv and AAC's state constitutional claims, we sustain the challenge to the summary judgment rendered on those claims against Huey.

4. Tortious Interference with Prospective Contracts

Yetiv and AAC claimed Huey caused repair and building permits to be withheld, resulting in a delay in renting the AAC apartments and a corresponding loss in income. The elements of a cause of action for tortious interference with a prospective contract are: (1) there was a reasonable probability the plaintiff would have entered into a contractual relationship; (2) the defendant's malicious and intentional act prevented the relationship from occurring, doing harm to the plaintiff; (3) the defendant lacked privilege or justification; and (4) as a result, the plaintiff suffered actual damage or loss. *Winston v. American Med. Int'l, Inc.*, 930 S.W.2d 945, 953 (Tex.App.--Houston [1st Dist.] 1996, writ denied). Huey moved for summary judgment against Yetiv and AAC's claim for tortious interference with prospective contracts on the grounds that (1) she was justified because the City Charter gave her the right to respond to citizen complaints and

(2) Yetiv and AAC produced no evidence that she kept them from contracting or that she acted maliciously.[30]

***20** A reasonable inference from Yetiv and AAC's summary judgment proof is that Huey twice ordered questionable investigations of Yetiv's property, rather than simply passing along citizen complaints, after Yetiv criticized her publicly. Therefore, Yetiv and AAC raised a fact issue on whether Huey's actions were justified. Additionally, we have already held that Yetiv and AAC raised fact issues on almost all Huey's evidence of her actions, including those actions that we must infer delayed permit issuance or were taken to do so. We may not consider Huey's and Calloway's conclusory statements that Huey acted without malice, in good faith, or reasonably. Finally, Huey's motion did not dispute, and she presented no summary judgment evidence refuting, Yetiv and AAC's allegation that AAC lost rental income because of the delay in permit issuance.

We sustain Yetiv and AAC's challenge to the summary judgment rendered on their claim against Huey for tortious interference with prospective contracts.

5. Qualified Immunity

Yetiv and AAC alleged Huey was liable under section 1983 for violations of their rights under the First (retaliation for public criticism), Fourth (unreasonable search), Fifth (takings by causing permit withholding), and Fourteenth (due process) Amendments. U.S. Const. amend. I, IV, V, XIV. Huey's summary

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[30] Huey's argument that Yetiv and AAC produced no evidence of these elements is misplaced, as it was Huey's burden, not Yetiv's, conclusively to negate these elements. *See* *Science Spectrum, Inc.*, 941 S.W.2d at 911. Nonetheless, we review her summary judgment evidence to see if she conclusively negated these elements.

judgment motion argued only that (1) Yetiv and AAC produced no evidence she did any of the allegedly unconstitutional acts and (2) she was entitled to qualified immunity. Huey was entitled to qualified immunity insofar as her conduct did not violate clearly established rights of which a reasonable person would have known. *Behrens v. Pelletier*, 516 U.S. 299, 305, 116 S.Ct. 834, 838, 133 L.Ed.2d 773 (1996).

i. Alleged First Amendment Violations

Yetiv alleged Huey violated the First Amendment by retaliating against him (1) for criticizing her, Link, and CURB's allegedly discriminatory enforcement on television or to Council; (2) for criticizing a secret settlement involving the Leaths's apartments in Huey's district; (3) for revealing Huey's alleged perjury in the Leaths's case to the City attorney's office and another Council member; and (4) for contributing to a newspaper article on that settlement. A state, state agency, or political subdivision cannot retaliate against a citizen who exercises his right of free speech on a matter of public concern. A claimant must show at least that a substantial and motivating factor for the complained-of action resulted from his exercise of free speech. *Levine v. Maverick County Water Control & Improvement Dist. No. 1*, 884 S.W.2d 790, 795 (Tex.App.--San Antonio 1994, writ denied).

Yetiv and AAC's evidence, viewed in the appropriate light, showed that, after Yetiv made these statements, (1) Huey sent two complaints--one "general" and one for unauthorized repair work--about Yetiv's property to Link's office under circumstances that could imply Huey made them directly or that they were unusual or unwarranted and (2) two neighbors, to whom Huey had promised AAC would be demolished, told Yetiv that Huey had them videotape AAC for her. Yetiv and AAC's evidence was also that, at the time of one

inspection, they were not performing the unauthorized repairs of which they were accused. Therefore, Yetiv and AAC's evidence raised a fact issue on whether Huey retaliated against them for Yetiv's statements. For the same reason, Huey was not entitled to summary judgment on the ground of qualified immunity.

ii. Alleged Fourth Amendment Violations

***21** Yetiv and AAC also alleged Huey's actions were unreasonable searches and invasions of his privacy interest in violation of the Fourth Amendment. Huey's summary judgment motion argued only that (1) there was no evidence that she caused any inspections or surveillance of Yetiv's property and (2) she was entitled to qualified immunity.

We hold the same evidence discussed immediately above raises a fact issue on each of Huey's summary judgment grounds, including immunity.

iii. Alleged Fifth and Fourteenth Amendment Violations

Yetiv and AAC also alleged that Huey violated due process, which resulted in an unconstitutional taking, by causing an arbitrary delay in the issuance of permits to AAC and a consequential loss of rental income. Huey's summary judgment motion argued only that (1) her actions could not deny due process or cause unconstitutional takings because she acted in the scope of her Council duties; (2) Yetiv and AAC did not produce evidence that she violated their due process rights or that, if she did, her acts caused the lost rental income; and (3) she was entitled to qualified immunity.

Viewed in the proper light, Yetiv and AAC's evidence was that Huey admitted she could control Link, which Huey also admitted would be illegal, *i.e.*, outside her Council duties; Link placed holds on the issuance of permits to AAC, even though Link had promised to lift at least one of those holds; Link's records contained notations that might indicate Huey controlled permit issuance for at least one other low-income apartment owner's complex in her district; Huey may have knowingly made incorrect statements to Council about Yetiv's case; and Huey promised two constituents that the AAC apartments would be demolished, not rehabilitated.

Substantive due process bars arbitrary governmental actions. *Levine*, 884 S.W.2d at 795. The denial of permits would be arbitrary if influenced by Huey for the retaliatory or political reasons alleged, rather than on the applications' merits. Therefore, Yetiv and AAC's evidence raised a fact issue on each of Huey's summary judgment grounds concerning Fifth and Fourteenth Amendment violations, including immunity.

We sustain Yetiv and AAC's challenge to the summary judgment rendered on their section 1983 claims against Huey.

5. Conclusion

We hold summary judgment was improperly rendered against each of Yetiv and AAC's claims against Huey.

C. Summary Judgment for Link

Link moved for a 166a(c) summary judgment against Yetiv and AAC's section 1983 claims and claims for tortious interference with contract and violations of the state constitution on the grounds that (1) the

statute of limitations barred all claims; (2) she enjoyed official and qualified immunity; (2) she did not violate their rights; and (3) Yetiv admitted there were no damages or contracts with which she could interfere. The trial judge denied summary judgment against the section 1983 claims and on the limitations defense, but granted summary judgment for Link on all state-law claims. We address neither the denial of summary judgment on the section 1983 claims, as these were nonsuited before trial, nor on limitations, as Link does not challenge this ruling on appeal. *Valores Corporativos, S.A. v. McClane Co.*, 945 S.W.2d 160, 161 n. 3 (Tex.App.--San Antonio 1997, writ denied) (declining to address limitations ground from summary judgment motion, on which trial judge expressly declined to rule, when no one challenged on appeal the judge's refusal to rule on limitations).

1. Section 101.106

***22** Link initially argues we must affirm the summary judgment in her favor because Yetiv and AAC obtained a final judgment against the City.

The Texas Tort Claims Act (TTCA) provides that a "judgment in an action ... under this chapter [the TTCA] bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim. Tex. Civ. Prac. & Rem.Code Ann. § 101.106 (Vernon 1997). This was not a ground for summary judgment; therefore, we cannot affirm on it. *Kassen v. Hatley*, 887 S.W.2d 4, 13 (Tex.1994).

We overrule Link's first challenge.

2. Official Immunity

Link moved for summary judgment on all Yetiv and AAC's state-law claims on the ground that she enjoyed official immunity. We follow the test set forth in *City of Lancaster v. Chambers* to determine whether Link carried her burden. *See* 883 S.W.2d at 653.

Yetiv and AAC have never disputed that Link's acts were discretionary. Rather, they argue they were not in Link's scope of authority or done in good faith. We examine Link's good faith first.

We hold that fact issues exist whether Link acted in good faith, as shown in the comparison of Link's evidence with that of Yetiv and AAC:

Link's Version

At the April 5, 1994 meeting with Yetiv, Link told him he needed to post a cash bond, sign a cash-bond agreement, submit cure plans for all nine condemned buildings, get an occupancy inspection report, and do work per City requirements before the DBO could be extended.

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1. Yetiv then completed an extension application, which Link approved subject to Yetiv's submitting a repair timeline for all nine buildings and his executing a cash-bond agreement.

2. Yetiv posted the cash bond, but refused to sign the cash-bond agreement.

Yetiv and ACC's Version

At this meeting, Link told Yetiv that an extension application and cure plan for four of the buildings were the sole requirements for the DBO's extension.

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1. Yetiv timely submitted both the extension request and the cure plan on the four buildings and requested a meeting to discuss the cure plan. He advised Link he would soon seek permits.

2. On May 18, 1994, Link instructed Yetiv to submit revised cure plans on the four buildings, agreeing permits would issue on the revised plans' receipt.

3. Yetiv never submitted detailed cure plans or timelines.

3. Yetiv submitted the revised cure plans two days later. Link did not respond to yetiv's two requests to meet before the DBO expired until June 8, 1994, two days after it expired.

4. Therefore, Link postponed extending the DBO.

4. At that meeting, Link said Yetiv's extension request and revised cure plans were in order, but she added a new requirement that Yetiv get an occupancy inspection.

5. Yetiv finally reached the occupancy inspector, Inspector Balay, on June 14, 1994. Inspector Balay could not inspect until Link authorized a DBO extension, but Link would not authorize the extension until Balay did the inspection. Link did not respond to Yetiv's requests about how to proceed.

6. Link sent Inspector London to the AAC apartments on June 22, 1994. Yetiv thought this was the required occupancy inspection and wrote Link to

advise her.

7. Link responded on July 5, 1994, adding new requirements of (i) posting a $2,200 bond and (ii) signing a bond agreement.

8. The bond agreement contained an affirmation that an occupancy inspection had already been completed, so Yetiv could not sign it until he had an occupancy inspection, which Link would not authorize. Yetiv wrote Link, asking again for approval of an occupancy inspection, and advising that he would sign the bond agreement once the inspection was done.

9. Link then granted only one 210-day extension during which all nine buildings had to be completed, although Yetiv had previously told Link it was impossible to complete all nine in that time.

10. Link, Yetiv, and Huey agreed on August

22, 1994 that Link would remove the hold so that the AAC apartments could get an occupancy inspection. Yetiv requested an inspection from Inspector Balay, but Link had not removed the hold, and the inspector could not comply. In Yetiv's presence, Inspector Balay left two messages for Link that Yetiv was seeking an inspection.

11. On October 4, 1994, Link claimed that Inspector Balay had said Yetiv had not scheduled an occupancy inspection, but Yetiv had, and Link had received two messages from Balay to that effect.

12. After the City sued Yetiv and AAC for repairing without permits, the City's plan checker, Don Tomlinson, approved Yetiv's permit application. When Link's department refused to issue the permits, Yetiv and AAC went to court. The

parties entered into an agreed order compelling issuance of permits on four buildings and on future buildings for which Yetiv submitted substantially similar applications.

13. Nine months later, Link's department again placed a hold on the AAC apartments, and permits stopped issuing. Link wanted another DBO extension request and cure plan.

14. Yetiv then applied for permits on four different AAC apartment buildings, which plan checker Tomlinson approved, but which could not be issued because of the hold. Yetiv submitted the requested cure plans, but no permits were issued until he went to court over a month later.

Link afforded Yetiv the same opportunities as other citizens who have requested a DBO extension or delay of DBO enforcement actions.

1. Link did not return many of Yetiv's calls, faxes, or letters.

2. Link alleged Inspector London found five CURB violations, but the alleged violations did not exist, and Link never followed through with a threatened reinspection. Yetiv infers that the five alleged violations were created to discriminate against him.

3. Link told Huey several untruths, including that (i) Yetiv had not submitted a cure plan; (ii) Link had no power to grant a DBO extension, contrary to what she had always told Yetiv; (iii) Yetiv was unwilling to pay the cash bond, when Link's office had received it the day before; and (iv) Link had agreed to allow Yetiv to sign the cash-

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The AAC apartment buildings were being reconstructed without permits or City approved construction plans.

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1. Compliance officers conducted the mass inspection of the AAC apartments on October 27, 1994 pursuant to a search warrant.

bond agreement after the occupancy inspection, which contradicted what she had told Yetiv.

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1. Yetiv was only shoring and cleaning up the AAC apartment buildings, not repairing or building without permits.

2. Yetiv advised Link three times that he was only temporarily repairing roof leaks, to which Link never objected.

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1. Fifteen days after criticizing Link on television and to City Council, and one day after criticizing Link at a public meeting, inspectors from Link's department appeared at the AAC apartments to videotape it, although Yetiv had earlier refused Link access to inspect. The same day, an asbestos inspector came to investigate a complaint by Link that the apartments were

being gutted without required notification and asbestos-containing material was being dumped in the street. However, the asbestos inspector determined that the complaint was unfounded.

2 Link neither requested the search warrant nor interfered with the inspectors' duties.

2. The next day, employees from Link's departments conducted a mass inspection of the AAC apartments. The search warrant affidavit asserted that all nine buildings were being repaired without permits; however, nothing was being done on six buildings, and only cleaning was being done on the remaining three. Moreover, the inspectors searched buildings not covered by the warrant. Although the inspectors issued 23 citations, the inspectors never showed for the court hearing, and the citations were dismissed. Yetiv infers Link ordered the inspections in retaliation for his

repeated public criticism of her.

3. Link did not request, initiate, or procure the issuance of citations on AAC at that time.

3. The report that Link prepared for Huey to read in response to Yetiv's statement to Council contained the alleged inaccuracies discussed above with regard to the summary judgment for Huey.

4. Inspection personnel, not assistant director Link, are responsible for determining whether a violation exists and related matters. The inspectors issue any citations.

All actions Link took concerning AAC were done because Yetiv did not comply with the DBO and extension requirements.

(See above evidence submitted by Yetiv and AAC.)

Furthermore, we cannot consider Link's statements that her actions regarding the AAC apartments were done in accordance with her duties and in the scope of her employment, in good faith, with honesty, without malice or fraudulent intent, and with lawful purpose because they are conclusory or do not set out the detailed, factual analysis the Supreme Court requires to show objective good faith. *See Wadewitz*, 951 S.W.2d at 466-47. We hold Yetiv and AAC raised a material dispute whether the facts on which Link relied to show good faith were accurate. *See Aguirre*, 977 S.W.2d at 864. Moreover, taking Yetiv and AAC's proof as true and drawing all inferences in their favor, no reasonable official in Link's position could have believed that (1) knowingly preparing inaccurate reports for City Council and (2) causing baseless inspections or ordering ones for retaliatory reasons was justified or in good faith.

We hold summary judgment was improperly rendered for Link on official immunity grounds.

3. Claims for Violations of the State Constitution

Yetiv and AAC sought a declaratory judgment for takings and due course of law violations under the Texas Constitution caused by improperly withholding permits. *See* Tex. Const. art. I, § § 17, 19. Link's summary judgment motion asserted, "All of Link's actions or involvement with Yetiv were done within the scope of her employment. All her actions toward Yetiv were lawful and were in good faith.... Yetiv has no material issue of fact that Link violated any of his federal or state constitutional rights." We construe this as an argument that (1) she was entitled to official immunity and (2) the facts recited in her affidavit show she did nothing that violated Yetiv and AAC's constitutional rights.

*23 We have already held that (1) Link did not conclusively show her entitlement to official immunity and (2) material fact issues exist on the veracity of the facts in Link's affidavit. Therefore, we sustain Yetiv and AAC's challenge to summary judgment rendered on their state constitutional claims against Link.

4. Tortious Interference with Prospective Contracts

Link's summary judgment motion argued only that Yetiv admitted in his deposition that no contracts subject to interference existed and he could not prove damages. However, Yetiv testified that he turned away "dozens" of potential renters (although he did not record their names) during the time he could not renovate the AAC apartments because of permit denials. Nowhere in the attached deposition testimony did Yetiv say he could not prove or calculate damages. Moreover, we must infer there was a "reasonable certainty" that AAC would have rented the apartments, because it was turning down potential renters' inquiries and offers. Therefore, Link did not carry her burden conclusively to negate these two elements.

Moreover, Yetiv and AAC offered controverting affidavit testimony, based on Yetiv's experience in running low-income apartments in the Spring Branch area, that, had he been issued permits and been able to renovate the AAC apartments timely, he could have filled up to 95 percent of them within 30 days of completion for $350 per month per apartment.

We sustain Yetiv and AAC's challenge to summary judgment on this claim against Link.

5. Conclusion

We hold summary judgment was improperly rendered against each of Yetiv and AAC's claims against Link.

CONCLUSION

We rule as follows:

1. We reverse the section 1983 judgment against the City and render judgment that Yetiv and AAC take nothing against the City. Therefore, we also render judgment dissolving the related injunction preventing inspections of Yetiv's properties. We reverse the attorney's fees awarded, render judgment that Yetiv and AAC take no attorney's fees under 42 U.S.C. § 1988 (Supp.1999), and remand for the trial court to consider and exercise its discretion on the amount of attorney's fees, if any, to be awarded solely under the Texas declaratory judgment statute. Tex. Civ. Prac. & Rem.Code Ann. § 37.009 (Vernon 1997). We reverse the costs of court below awarded against the City and remand that issue for further consideration.

2. We reverse the judgment declaring various CURB provisions unconstitutional. We render judgment dissolving the related injunction preventing CURB's enforcement.

3. We reverse the summary judgments in favor of Link and Huey and remand for determination of the claims against them.

Proceedings on remand are limited to AAC's and Yetiv's suit against Link and Huey; to consideration of the amount of attorney's fees, if any, to be awarded under the Texas declaratory judgment statute; and to the consideration of costs to be awarded, if any, in the trial court. *See* *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex.1986); *Hansen v. Academy Corp.*, 961 S.W.2d

329, 331 (Tex.App.--Houston [1st Dist.] 1997, writ denied).

***24** We overrule all outstanding motions.

APPENDIX C

Court of Appeals of Texas,
Houston (1st Dist.).

The CITY OF HOUSTON, Appellant,
v.
ASPENWOOD APARTMENT CORPORATION and Jack Yetiv, M.D., PH.D., Appellees.
Aspenwood Apartment Corporation and Jack Yetiv, M.D., PH.D., Appellants,
v.
Beatrice Link and Helen Huey, Appellees.

No. 01-97-01378-CV.

Jan. 24, 2002.

On Appeal from the 215th District Court, Harris County, Texas, Trial Court Cause No. 9459707.

Panel consists of Chief Justice SCHNEIDER and Justices HEDGES and NUCHIA.

SUPPLEMENTAL OPINION ON REHEARING

PER CURIAM.

***1** The Court today considers (1) the joint "motion for rehearing en banc" of appellees Jack Yetiv and Aspenwood Apartment Corporation ("AAC"), (2) the "motion for rehearing en banc pertaining to the unconstitutionality of the City of Houston's CURB [Comprehensive Urban Rehabilitation and Minimum Building Standards] ordinance" of appellee Yetiv, and (3) the "brief of amicus curiae in support of Yetiv's motion for rehearing en banc" of Mr. Michael B. Boylan. The rehearing motions are denied, with the following comments.

I. Yetiv and AAC's En Banc Rehearing Motion

A. Standard of Review

Yetiv and AAC claim some of our factual recitations were not in the proper light, but these were only background facts. In treating the points of error, we relied only on the evidence that favored appellees.

We overrule this argument.

B. The Relief Granted

Yetiv and AAC claim we could only remand, not render on, their Section 1983 claims because the City did not object to jury questions two and three and because justice demands a remand. We disagree.

Rendition was proper because the City had moved for directed verdict on all causes of action subsumed by questions two and three.[1] *See* Salinas v. Fort Worth Cab & Baggage Co., 725 S.W.2d 701, 704 (Tex.1987) (holding instructed verdict motion preserves no-evidence challenge). Additionally, the City objected to both jury questions because (1) Beatrice Link was not a final policymaker; (2) they impermissibly allowed respondeat superior liability; and (3) they improperly defined "final policy" or "final policymaker."

We also disagree that the interests of justice require a remand. We did take judicial notice of certain ordinances on appeal, but only in response to an argument Yetiv and AAC's own brief raised. We also considered standing for the first time on appeal, but (1) standing may always be so raised and (2) we

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[1] The directed verdict motion did not say "no evidence," but it argued Yetiv and AAC had not identified any City policy, custom, or practice, or any final policymaker, under Section 1983. This preserved a no-evidence challenge.

discussed standing only in relation to Yetiv's CURB claims, the subject of his separate rehearing motion, and not in relation to Yetiv and AAC's Section 1983 claims, the subject of this joint rehearing motion. Yetiv and AAC also urge a remand because "much evidence" was excluded; assuming they are referring to their bill of exceptions, appellees never complained on original submission of that evidence's exclusion. Justice does not require a remand for excluded evidence about which no one timely complained.

We overrule these arguments.

C. Cost Assessment

Yetiv and AAC argue that costs should not be assessed (1) against Section 1983 plaintiffs or (2) for a reversal on "technical legal grounds." They admit that this challenge is not fully briefed, and there is no citation to authority. *See* Tex.R.App. P. 38.1(h). They offered to supplement their briefing, but their motion is already 31 pages, and Yetiv's separate rehearing motion is another 15 pages. *See* Tex.R.App. P. 49.10. We thus overrule this challenge for lack of proper briefing. Additionally, our holding of evidentiary insufficiency is not a "technical legal ground."

***2** We overrule these arguments.

D. Bill of Exceptions

Yetiv and AAC claim we should have considered evidence from their bill of exceptions, but they did not complain by cross-point of this evidence's exclusion before rehearing, even though the City's briefing had raised the issue. *See* *Sandy Int'l, Inc. v. Hansel & Gretel Children's Shop, Inc.*, 775 S.W.2d 802, 807 (Tex.App.-Dallas 1989, no writ). We thus decline to consider this challenge now. *See, e.g.*, *McGuire v.*

F.D.I.C., 561 S.W.2d 213, 216 (Tex.Civ.App.-Houston [1st Dist.] 1977, no writ) (op. on reh'g); *Trice Prod. Co. v. Dutton Drilling Co.*, 333 S.W.2d 607, 617 (Tex.Civ.App.-Houston 1960, writ ref'd n.r.e.) (op. on reh'g).

E. Liability

1. City Council's Vote to Sue Yetiv and AAC

Yetiv and AAC complain we erred in holding that City Council did not ratify its subordinates' actions because (1) it did not vote to withhold permits or search AAC, but voted to sue Yetiv and AAC for unrelated violations and (2) its "not investigating Yetiv's claims is not an express ratification of anything."

First, we reject the claim that we created a state-of-mind requirement for proving ratification of unconstitutional acts. We merely recognized that the unconstitutional action had to arise out of City Council's acts. *See* Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 403-04, 117 S.Ct. 1382, 1388 (1997). This is what happened in *Owen v. City of Independence*[2] and *City of Newport v. Fact Concerts, Inc.*,[3] which we cited, and it is why City Council's motives were irrelevant. *See also* Brown, 520 U.S. at 405-06, 117 S.Ct. at 1389 (explaining how "fault and causation were obvious" in *Owen*, *Fact Concerts*, and *Pembaur*[4]). Second, we disagree that we confused "city policies" and "ratification": our opinion treated them separately. Third, we disagree that we

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[2] 445 U.S. 622, 100 S.Ct. 1398 (1980).

[3] 453 U.S. 247, 101 S.Ct. 2748 (1981).

[4] *Pembaur v. City of Cincinnati*, 475 U.S., 106 S.Ct. 1292 (1986).

erred in holding that failure to investigate was not an express ratification. Yetiv and AAC rely on *Fact Concerts,* in which the Court noted that the council did not investigate before canceling a license,[5] but (1) the holding was not based on that fact; (2) unlike here, the injury there arose directly out of the license cancellation; and (3) "[M]unicipal liability under § 1983 attaches where--*and only where--a deliberate choice to follow a course of action is made from among various alternatives* ...."[6]

We overrule these arguments.

2. Link's Status as a Final Policymaker

We decline to revisit our holding that effective review of Link's decisions existed. Yetiv and AAC also claim we did not consider all the facts, but we considered every fact upon which their briefs relied.[7] We also disagree that "case law suggests that one need not make 'policy' in order to be a policymaker," and we note that Yetiv and AAC waived this argument by not raising it on original submission. We further disagree that we erred in not following *City of Houston v. De*

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[5] 453 U.S. at 251, 101 S.Ct. at 2751.

[6] *Pembaur,* 475 U.S. 469 at 483, 106 S.Ct. at 1300 (emphasis added). *Cf. City of St. Louis v. Praprotnik,* 485 U.S. 112, 130, 108 S.Ct. 915, 928 (1988) (in discussing why particular individual was not final policymaker, stating, "[T]he mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority....").

[7] The only "fact" that we did not consider was one that was not supported by any of the documents cited in their original briefs. On rehearing, Yetiv and AAC rely on new facts, but, even if we considered these, they do not change our conclusion.

Trapani,[8] which we properly distinguished because it took "a less restrictive view" of a final policymaker in light of the "takings" claim raised there. We finally disagree that *City of Lubbock v. Corbin*,[9] on which we relied, is distinguishable: (1) the *Corbin* official was more than "a mere building inspector" and, (2) as in *Corbin*, an appeals process existed for Link's decisions.

***3** We overrule these arguments.

3. Whether This is a "Takings" Case

Yetiv and AAC argue that (1) theirs is a "takings" case and, even if not, (2) we should have followed *De Trapani* because the Supreme Court (in City of Monterrey v. Del Monte Dunes, Ltd., 526 U.S. 687, 119 S.Ct. 1624 (1999)) has determined that all Section 1983 actions should be treated alike. The applicable jury question, number three, asked whether the City "arbitrarily and/or capriciously denied or withheld permits." This is due process, not "takings," language. *Cf., e.g.*, 12A Tex. Jur. 3rd *Constitutional Law* § 168 (2000) (due process is intended to protect citizens from arbitrary governmental action); J. Hadley Edgar, Jr. & James B. Sales, 4 Texas Torts & Remedies § 62.03[4][c] (2001) (substantive due process is violated "when the state action has been 'arbitrary, capricious, or wholly unrelated to the legitimate state good....' "). Additionally, the *Del Monte Dunes* Court held only that all Section 1983 claims are "actions at law" for purposes of the Seventh Amendment's right to a jury trial. *See generally* id., 526 U.S. at 709 (five justices joining), 711 (four justices joining), 725-26 (Scalia, J.,

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[8] 771 S.W.2d 703 (Tex.App.-Houston [14th Dist.] 1989, writ denied).

[9] 942 S.W.2d 14, 20-21 (Tex.App.-Amarillo 1996, writ denied).

concurring), 119 S.Ct. at 1638 (five justices joining), 1639 (four justices joining), 1645-46 (Scalia, J., concurring). To the extent *Del Monte Dunes* 's holding might have broader application, *De Trapani* must succumb to *Del Monte Dunes,* so that we would then no longer follow *De Trapani,* which treated one type of Section 1983 claim differently from others.

We overrule these arguments.

4. Persistent Custom or Practice

Yetiv and AAC argue that (1) a "persistent, widespread, permanent, and well settled" custom or usage is required simply to show constructive knowledge and thus (2) if a city has actual knowledge of unconstitutional acts, a showing that the acts were widespread is unnecessary. We agree with the City, however, that (1) the "persistent, widespread, permanent, and well settled" requirement exists not just to show constructive knowledge, but also to satisfy Section 1983's "custom or usage" requirement;[10] (2) to show a city acquiesced in that broad "custom or usage"; and thus (3) to prevent liability based solely on respondeat superior.[11]

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[10] *See* 42 U.S.C.A. § 1983 (Supp.2002) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State....").

[11] *See* *Webster v. City of Houston*, 735 F.2d 838, 841, 842 (5th Cir.1984) ("Official policy is: ... A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, *is so common and well settled as to constitute a custom that fairly represents municipal policy* .... If actions of city employees are to be used to prove a custom ..., those actions must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge *that the*

Therefore, to prevail, one must show that a city has actual or constructive knowledge *of a "persistent, widespread, common, and well settled custom,"* not just of a small number of instances. *Cf.* Hamilton v. Rogers, 791 F.2d 439, 443 (5th Cir.1986); *Webster,* 735 F.2d at 842.

We overrule this argument.

II. Yetiv's Motion for En Banc Rehearing on CURB

In a separate rehearing motion, Yetiv and amicus argue we erred in reversing the summary judgment declaring CURB unconstitutionally vague on its face and as applied.

A. Standing

Yetiv and amicus complain we did not consider that some provisions of CURB's predecessor have similar language to that in the complained-of CURB sections. However, Yetiv never argued in either his motion for partial summary judgment, in his reply to the City's response thereto, or in his brief on appeal that he was

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objectionable conduct is the expected, accepted practice of city employees. ") (emphasis added); *see also* Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 691, 98 S.Ct. 2018, 2036 (1978) ("Congress included customs and usages [in Section 1983] because of the persistent and widespread discriminatory practices of state officials.... Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."); *see also* Bennett v. City of Slidell, 728 F.2d 762, 767 (5th Cir.1984) ("Section 1983 itself uses 'custom' and 'usage' in describing the aegis of state law under which a person must have acted to be subject to § 1983 liability.... The Supreme Court in *Monell* wrote that practices of officials may become 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.' ").

challenging CURB's predecessor. Neither did he timely argue that CURB's provisions were similar to those of its predecessor; ask us to take judicial notice of CURB's predecessor; or indicate where in the appellate record a verified copy of CURB's predecessor could be found.[12] Rather, Yetiv moved for summary judgment solely under CURB, claiming *its* provisions were unconstitutional. We strictly construe Yetiv's summary judgment grounds. *Cf.* *Chadderdon v. Blaschke*, 988 S.W.2d 387, 388 (Tex.App.-Houston [1st Dist.] 1999, no pet.). "A [summary judgment] motion must stand or fall on the grounds expressly presented in the motion." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 340 (Tex.1993); *accord* *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex.1997). Accordingly, we decline to revisit our holding based on this argument. Moreover, we reject Yetiv's and amicus's remaining standing arguments for the reasons stated in our original opinion.

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[12] For the first time on rehearing, we have been pointed to a verified copy of CURB's predecessor in our record. The appellate record consists of over 172 exhibits, some of which are quite thick; 2015 pages of clerk's record; and 16 volumes of reporter's record. Yetiv never told this Court the record contained a verified copy of CURB's predecessor, either in his original briefs, his many appellate motions, or his rehearing motions. Rather, the only reference to that document comes in a footnote in Yetiv's opponent's rehearing reply brief. In any event, the copy of CURB's predecessor is not part of the summary judgment evidence, and it was Yetiv's burden to produce it for summary judgment and to raise as a summary judgment ground that he should prevail because CURB and its predecessor were similar. He did none of this.

B. The Merits of Yetiv's Facial Vagueness Challenge

***4** Yetiv and amicus argue we erred in holding Yetiv's facial vagueness challenge would succeed "only if the challenged CURB provisions are impermissibly vague in all their applications" because *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[13] on which we relied, has either been "rejected" (Yetiv) or replaced with a "more expansive view" (amicus) by *Kolender v. Lawson*.[14]

The Supreme Court has never "rejected" *Flipside*, though it may have limited it somewhat. *See* Chicago v. Morales, 527 U.S. 41, 55 & n. 22, 119 S.Ct. 1849, 1858 & n. 22 (1999); *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1859. *But cf.* United States v. Solerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987). Any limitation of *Flipside* does not affect our original holding, which was consistent with *Flipside* 's post-*Kolender* interpretation by the Court of Criminal Appeals[15] and by the vast majority of Texas courts of appeals.[16]

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[13] 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191 (1982).

[14] 461 U.S. 352, 103 S.Ct. 1855 (1983).

[15] *See* Sanchez v. State, 995 S.W.2d 677, 683 (Tex.Crim.App.1999), *cert. denied*, 528 U.S. 1021 (1999); *Long v. State*, 931 S.W.2d 285, 287-88, 295 (Tex.Crim.App.1996); *Cain v. State*, 855 S.W.2d 714, 717 (Tex.Crim.App.1993); *Santikos v. State*, 836 S.W.2d 631, 633 (Tex.Crim.App.1992); *Vuong v. State*, 830 S.W.2d 929, 941 (Tex.Crim.App.1992); *Briggs v. State*, 789 S.W.2d 918, 923 & n. 7 (Tex.Crim.App.1990); *Bynum v. State*, 767 S.W.2d 769, 774 (Tex.Crim.App.1989); *Briggs v. State*, 740 S.W.2d 803, 806 (Tex.Crim.App.1987); *Clark v. State*, 665 S.W.2d 476, 482 83 (Tex.Crim.App.1984).

[16] *See* State v. Markovich, 34 S.W.3d 21, 25-26 (Tex.App.-Austin 2000, pet. granted); *Kirschner v. State*, 997 S.W.2d

We overrule this argument.

C. The Merits of Yetiv's As Applied Vagueness Challenge

"If a law clearly applies to an individual's conduct under any construction of [the challenged law], then that law cannot be unconstitutionally vague as applied to his conduct." *Vuong v. State*, 830 S.W.2d 929, 941 (Tex.Crim.App.1992). Yetiv and amicus argue we erred in holding the complained- of provisions of CURB failed *Vuong* 's test because only two of AAC's buildings allegedly fell clearly within CURB's prohibitions; the remaining nine buildings allegedly did not. It was movant Yetiv's burden to show all elements of his constitutional claims conclusively, including that the law was unconstitutionally applied to him. *See* Tex.R. Civ. P. 166a(c); *Vuong*, 830 S.W.2d at 941; *Ronin v. Lerner*, 7 S.W.3d 883, 885 (Tex.App.-Houston [1st Dist.] 1999,

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335, 343 (Tex.App.- Austin 1999, pet. ref'd); *Webb v. State*, 991 S.W.2d 408, 415-16 (Tex.App.-Houston [14th Dist.] 1999, pet. ref'd); *Sullivan v. State*, 986 S.W.2d 708, 712-14 (Tex.App.-Dallas 1999, no pet.); *Tyrone v. State*, 854 S.W.2d 153, 155 (Tex.App.-Fort Worth 1993, pet. ref'd); *Fox v. State*, 801 S.W.2d 173, 175 (Tex.App.-Houston [14th Dist.] 1990, pet. ref'd); *Robinson v. State*, 783 S.W.2d 648, 651 (Tex.App.-Dallas 1989), *aff'd*, 841 S.W.2d 392 (Tex.Crim.App.1992) (adopting relevant text as its own opinion); *Smith v. State*, 772 S.W.2d 946, 950 (Tex.App.-Dallas 1989, pet. ref'd); *Lear v. State*, 753 S.W.2d 737, 739-40 (Tex.App.-Austin 1988, no pet.) (also noting, "A law which imposes a criminal penalty is subject to greater scrutiny by a reviewing court. Nevertheless, because the provision does not reach constitutionally protected conduct and is reasonably clear in its application to the complainant, it is not constitutionally infirm."); *Schultz v. State*, 725 S.W.2d 411, 413 (Tex.App.-Houston [1st Dist.] 1987), *aff'd on other grounds*, 771 S.W.2d 549 (Tex.Crim.App.1989).

no pet.). It was thus his burden to show at least that the buildings for which citations were issued did not clearly fit within any construction of the complained-of CURB provisions. However, Yetiv's motion for partial summary judgment never differentiated among the buildings for purposes of his as-applied vagueness challenge. Yetiv does not dispute that some of AAC's buildings were severely dilapidated, yet he, as the movant, did not show whether some or all of these severely dilapidated buildings were also those for which he received CURB citations.

We overrule this argument.

D. The Injunction

We decline to revisit our disposition based on Yetiv's rehearing arguments, which are identical to those raised on original submission. We reiterate, however, that the City did not "agree" to the injunction, contrary to Yetiv's assertion.
We overrule these arguments.

III. Conclusion

The panel denies all motions for rehearing. A unanimous Court votes against en banc consideration on rehearing. *See* Tex.R.App. P. 49.7.

The panel further denies all other pending motions of any party.

It is so ORDERED.

***5** Appellees moved for rehearing and rehearing en banc.

The panel denied the rehearing motions addressed to it.

A majority of the Court voted against en banc consideration on rehearing of the panel's decision. *See* Tex.R.App. P. 49.7.

Justice COHEN did not participate in the decision of this appeal after his recusal on February 3, 2000.

APPENDIX D

CAUSE NO. 94-59707

IN THE DISTRICT OF
HARRIS COUNTY, TEXAS
215TH JUDICIAL DISTRICT

ASPENWOOD APT. CORPORATION
AND JACK YETIV, M.D., Ph.D.,
Plaintiffs,
v.

CITY OF HOUSTON, BEATRICE
LINK, INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY, AND HELEN
HUEY, INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY,
Defendants.

MODIFIED FINAL JUDGMENT

On the 4th day of August, 1997, came on for trial the above-entitled and numbered cause and Plaintiff Jack Yetiv, M.D., Ph.D., *pro se*, and Plaintiff Aspenwood Apartment Corporation and Defendant City of Houston by and through their attorneys of record announced ready for trial. A jury of 12 persons was duly impaneled and sworn. The Court realigned the parties prior to trial to reflect their true interests, therefore Jack Yetiv and Aspenwood Apartment Corporation are at times referred to herein as "Plaintiffs," and the City of Houston as "Defendant."

After presentation of testimony, evidence, motions and argument of counsel, both sides rested. Thereafter, the City of Houston urged its Motion for Directed Verdict, which was denied. Questions were then submitted to the Jury and a verdict was rendered

by the Jury, and the Court thereupon ordered the verdict received and filed on August 27, 1997. The verdict of the jury was as follows:

Jury Question No. 1: Do you find that the City of Houston retaliated against Dr. Jack Yetiv for engaging in speech activities involving public criticism of the City of Houston, and that his public criticism of the City of Houston was a substantial or motivating factor in the City of Houston's actions?

Answer "yes" or "no".

ANSWER: No.

Jury Question No. 2: Do you find that the City of Houston undertook one or more searches of Aspenwood Apartment Corporation's property without a search warrant which was based on a truthful affidavit and/or that such searches were beyond the scope of the warrant through decisions of Beatrice Link, the Houston City Council and/or through a pattern, practice, policy or custom in the City?

Answer "yes" or "no".

ANSWER: Yes.

Jury Question No. 3: Do you find that the City of Houston arbitrarily and/or

capriciously denied or withheld permits for authorization to work on its buildings to Aspenwood Apartment Corporation, through decisions of Beatrice Link, the Houston City Council and/or through a pattern, practice, policy or custom in the City?

Answer "yes" or "no".

ANSWER: Yes.

If you have answered "yes" to Questions No. 1, then answer Question No. 4.

Question 4: What amount of money, if any, would fairly and reasonably compensate Dr. Jack Yetiv for the damages caused by the conduct you have found in your answer to Question #1?

Answer in dollars and cents.

ANSWER: _____ (not anwered)

If you have answered "yes" to Questions No. 2, then answer Question No. 5.

Question 5: What amount of money, if any, would fairly and reasonably compensate Aspenwood Apartment Corporation for the damages caused by the conduct you have found in your answer to Question #2?

Answer in dollars and cents.

ANSWER: $3,000.00.

If you have answered "yes" to Questions No. 3. then answer Question No. 6.

Question 6: What amount of money, if any, would fairly and reasonably compensate Aspenwood Apartment Corporation for the damages caused by the conduct you have found in your answer to Question #3?

Answer in dollars and cents.

ANSWER: $337,500.

The answer of the Jury were concurred in by ten members of the Jury. The verdict was received and filed by the Court without objection, and the Court ordered the Jury discharged. The Court is of the opinion that on the merits judgment should be granted in favor of Plaintiff Aspenwood Apartment Corporation on the Jury Questions and the answers of the Jury, and to Plaintiff Jack Yetiv based on orders for equitable and summary relief entered prior to the jury being sworn. It is therefore

ORDERED, ADJUDGED AND DECREED that Plaintiff Aspenwood Apartment Corporation have and recover of and from the Defendant The City of Houston the sum of $340,500 as the principal amount of its damages and that it have interest on this sum from the 15th day of August, 1995, at the rate of ten percent (10%) per annum until paid.

Prior to trial, there was a hearing on the Motion of Counter-Plaintiff Jack Yetiv for partial summary judgment seeking judgment declaring the City of Houston's CURB Ordinance unconstitutional. An

interlocutory summary judgment was signed on August 5, 1997. This judgment is hereby made final. It is therefore

ORDERED, ADJUDGED AND DECREED that

1) Section 10-361(a)(3, 5, 6, 7, 8 and 10) and Section 10-361(b)(1 and 2) of the Comprehensive Urban Rehabilitation and Building Minimum Standards ("CURB") Ordinance of the City of Houston are hereby declared unconstitutional because they are vague and/or overbroad;

2) The City of Houston is hereby permanently enjoined from enforcing the above sections of the CURB Ordinance.

This injunction is also binding upon the City of Houston's officers, agents, employees, attorneys, and upon those persons in active concert or participation with them who receive actual notice of this order in any manner.

On September 15, 1997, the Plaintiffs presented their evidence of attorney's fees to the Court pursuant to the stipulation of all the parties during the trial of this case that this issue was reserved for the Court and a separate fact-finding would be held after the trial of the main case. Attorney's fees were requested by Plaintiffs pursuant to 42 U.S.C. § 1988 and § 37.009 of the Texas Civil Practice and Remedies Code. The Court finds the sum of $70,000 is a reasonable fee for the necessary work in prosecuting Jack Yetiv's claims for a declaratory judgment that the CURB Ordinance is unconstitutional, and the Court further finds that the sum of $99,450 is a reasonable fee for the necessary work in prosecuting Aspenwood

Apartment Corporation's claims for damages under the Federal civil rights statute 42 U.S.C. § 1983 and under Article 1, § 17 of the Texas Constitution. It is therefore

ORDERED, ADJUDGED AND DECREED that Plaintiff Jack Yetiv have and recover of and from the City of Houston the sum of $70,000 as reasonable attorney's fees for prosecution of his case. It is further

ORDERED, ADJUDGED AND DECREED that Plaintiff Aspenwood Apartment Corporation have and recover of and from the City of Houston the sum of $99,450 as reasonable attorney's fees for prosecution of its case. It is further

ORDERED, ADJUDGED AND DECREED that all sums due under this judgment shall bear interest at the rate of ten percent (10%) per annum from this date until paid. It is further

ORDERED, ADJUDGED AND DECREED that Plaintiffs have and recover of and from the City of Houston the additional sum of attorney's fees in the amount of $50,000 if an appeal from this judgment is perfected to the Court of Appeals by the City of Houston and that Plaintiffs shall have and recover an additional sum of attorney's fees in the amount of $20,000 if the City of Houston files an appeal from any judgment by the Court of Appeals by filing an Application for Writ of Error with the Supreme Court of Texas and another $20,000 if such writ is granted. The $40,000 will also be due Plaintiffs if the City prevails in the Court of Appeals and Plaintiffs appeal to and prevail in the Texas Supreme Court. An additional $30,000 will be due Plaintiffs if an application for writ of certiorari is filed with the Supreme Court by either party and Plaintiffs prevail. It is further

ORDERED, ADJUDGED AND DECREED that the City of Houston take nothing on any claims it has made in this case, that Jack Yetiv take nothing on this claim for retaliation under the First Amendment to the U.S. Constitution, and that all relief not specifically granted herein is denied.

Prior to trial, the Court also granted a Motion for Summary Judgment in favor of Helen Huey in her individual capacity and partially granted a Motion for Summary Judgment in favor of Bea Link on Plaintiffs' claims against her under state law, with both Judgments being rendered over Plaintiffs' opposition. Plaintiffs thereafter filed a nonsuit only as to their § 1983 causes of action, without prejudice, against Beatrice Link in her individual capacity. It is therefore

ORDERED, ADJUDGED AND DECREED that Plaintiffs take nothing from Helen Huey individually and from Bea Link individually on Plaintiffs' state law claims against her, and that Plaintiffs' § 1983 claims against Beatrice Link, individually, be dismissed without prejudice. Plaintiffs do not waive their right to appeal this Order. It is further

ORDERED, ADJUDGED AND DECREED that all costs statutorily provided for under the DJA and pursuant to 42 U.S.C. § 1988, including but not limited to the $1,000 sanction in the Court's May 2, 1997 Order, are assessed against the City of Houston. The amount of such costs is $38,242.71 /s/. Plaintiffs shall have all writs and processes allowed by Texas law for collection of this judgment if not timely paid. Judgment for costs of court shall run to the benefit of the respective Plaintiff who paid them.

Prior to trial the Court also granted a temporary injunction regarding the City's inspections of the property at 2121 Peck, 1275 Witte, and 10157

Westview, Houston, Texas. Based on the Jury's Answers to the above Questions and the evidence at trial, this Order should be made final. It is therefore

ORDERED that the City of Houston and all of its officers, agents, servants, representatives, employees, attorneys or anyone else under their control, be and are hereby commanded forthwith to desist and refrain from conducting ANY inspection, other than those related to construction and/or renovation of building of the apartment complexes at 1275 Witte, 10157 Westview, 2121 Peck Rd., UNLESS the inspections are authorized by a Court or by Dr. Yetiv, in writing. Nothing in this Order restricts the City of Houston Fire Department or Police Department of another City department or agency from responding to any emergency assistance requests from the aforementioned properties.

SIGNED, RENDERED AND ENTERED this 20 day of October, 1997.

/s/
JUDGE, 215th JUDICIAL DISTRICT

APPENDIX E

Title 42 U.S.C. § 1983 provides in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

APPENDIX F

I, ANNA RUSSELL, City Secretary of the City of Houston, Texas, do hereby certify that the within and foregoing is a true and correct copy of an excerpt from the Code of Ordinances of the City of Houston, being Sections 2-301 through 2-304 of Chapter 2, as the same appears in the records of my office.

WITNESS my hand and the Seal of said City this 17th day of September, 2002.

/s/
Anna Russell
City Secretary of City of Houston

ARTICLE X. LEGAL REPRESENTATION AND INDEMINIFICATION OF CITY OFFICERS AND EMPLOYEES

Sec. 2-301. Generally.

The purpose of this article is to establish the city's policy of providing legal representation and indemnification to city officers, employees and volunteers against whom civil lawsuits are brought alleging acts or omissions by such officers, employees and volunteers during the course and scope of their assigned duties with the city.
(Ord. No. 91-1611, § 1, 11-13-91)

Sec. 2-302. Definitions.

As used in this article, the following terms and phrases shall have the following meanings:

City attorney means the city attorney or his designee.

Covered person means a person who is:

(1) A salaried employee of the city;

(2) A member of a city board, commission, or committee created by charter, ordinance, or resolution of the city;

(3) The mayor, the city controller, or a member of the city council; or

(4) A volunteer who has been approved as a volunteer by a departmental volunteer coordinator and who is working under the direction of an employee of the city.

(Ord. No. 91-1611, § 1, 11-13-91)

Sec. 2-303. Legal representation.

(a) The city shall, subject to the exclusions described below, provide legal representation to a covered person for any claim or lawsuit brought against the covered person alleging acts or omissions by the covered person during the course and scope of their assigned duties with the city.

(b) The city may provide legal representation to a covered person by assigning an assistant city attorney to undertake such representation or by employing a private lawyer or law firm.

(c) The city shall pay all costs associated with legal representation, including any fee of the attorney selected by the city attorney to represent the employee, court fees, deposition and expert witness

fees and other costs associated with the preparation for or presentation of the covered person's defense.

(d) Covered persons who wish to select and employ their own attorney may do so at their own cost.

(e) Notwithstanding the above, the city shall not be obligated to provide legal representation to a covered person if:

(1) The acts or omissions alleged in the claim or lawsuit are intentional or wilful, and the city attorney has determined, based on a departmental investigation or such other information as is available to the city attorney, that the covered person intentionally or willfully violated a city ordinance, rule or policy or a clearly established constitutional or statutory right or was otherwise acting in bad faith; or

(2) The claim or lawsuit against the covered person has been brought by or on behalf of the city.

(Ord. No. 91-1611, § 1, 11-13-91)

Sec. 2-304. Indemnification.

(a) The city shall, subject to the exclusions and other provisions of this section, pay judgments, attorney's fees and costs assessed against a covered person in a lawsuit for which the city has an obligation to provide legal representation under section 2-303, above.

(b) The city shall not pay that portion of any judgment against a covered person that awards:

(1) Exemplary or punitive damages; or

(2) Awards actual or compensatory damages arising out of a cause of action for official misconduct.

(c) Total payments made under this section on behalf of a covered person shall not exceed one hundred thousand dollars ($100,000.00) to any one (1) person or three hundred thousand dollars ($300,000.00) for any single occurrence of personal injury or death or ten thousand dollars ($10,000.00) for a single occurrence of property damage.

(d) Where multiple claims are made against two (2) or more covered persons or against the city and one (1) or more covered persons for injuries and/or damages from a single occurrence, and where the city's liability is limited by the Texas Tort Claims Act, the total of all payments arising out of the bodily injury or death of any one (1) person shall not exceed two hundred fifty thousand dollars ($250,000.00) and the total of all payments arising out of a single occurrence shall not exceed five hundred thousand dollars ($500,000.00).

(e) The city shall have the right to investigate, negotiate, and settle any claim or suit as it determines desirable.

(Ord. No. 91-1611, § 1, 11-13-91)